TEXAS REGISTER

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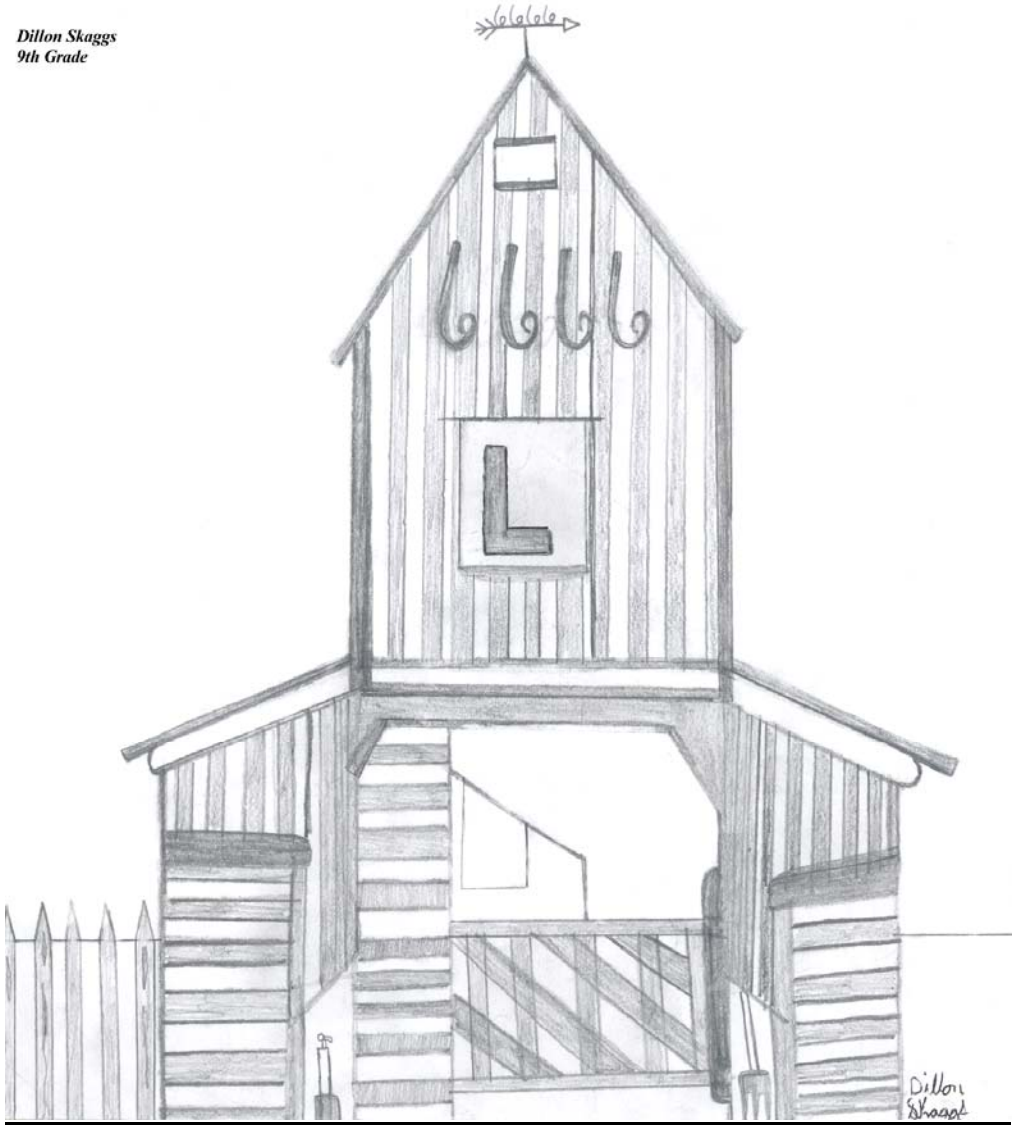

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

ADOPTED RULES

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for November 3, 2010

Appointed as Judge of the 439th Judicial District Court, Rockwall County, pursuant to HB 4833, 81st Legislature, Regular Session, for a term until the next General Election and until his successor shall be duly elected and qualified, David E. Rakow of Rockwall.

Appointed to the Sulphur River Basin Authority Board of Directors for a term to expire February 1, 2011, Michael E. Russell of Clarksville (replacing Richard Smith of Clarksville who resigned).

Appointed to the Texas State Board of Plumbing Examiners for a term to expire September 5, 2015, Tammy Betancourt of Houston (Ms. Betancourt is being reappointed).

Appointed to the Texas State Board of Plumbing Examiners for a term to expire September 5, 2015, Carlos DeHoyos of Gladewater (replacing Robert Jalnos of Shavano Park whose term expired).

Appointed to the Texas State Board of Plumbing Examiners for a term to expire September 5, 2015, Richard A. Lord of Pasadena (Mr. Lord is being reappointed).

Appointments for November 4, 2010

Appointed to the Texas Racing Commission for a term to expire February 1, 2015, Michael F. Martin of San Antonio (replacing Gerald "Kent" Carter of Caldwell whose term expired).

Rick Perry, Governor

TRD-201006491

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0928-GA

Requestor:

The Honorable Vince Ryan

Harris County Attorney

1019 Congress, 15th Floor

Houston, Texas 77002

Re: Authority of the Harris County Department of Education to operate an on-site health clinic for its employees (RQ-0928-GA)

Briefs requested by December 6, 2010

RQ-0929-GA

Requestor:

The Honorable David K. Walker

Montgomery County Attorney

207 West Phillips, Suite 100

Conroe, Texas 77301

Re: Maximum salary payable to a presiding district court judge of a local administrative district (RQ-0929-GA)

Briefs requested by December 6, 2010

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201006494
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: November 10, 2010

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Opinions

Opinion No. GA-0814

The Honorable Scott Brumley

Potter County Attorney

500 South Fillmore Street, Room 303

Amarillo, Texas 79101-2548

Re: Whether revenue from the sale of prepaid phone cards in a county jail commissary should be credited to the sheriff or to the general fund of the county (RQ-0867-GA)

S U M M A R Y

Revenue from the sale of prepaid phone cards in the county jail commissary should be credited to the sheriff for the use of county jail inmates rather than to the general fund of the county.

Opinion No. GA-0815

Ms. Anne Heiligenstein, Commissioner

Texas Department of Family and Protective Services

Post Office Box 149030

Austin, Texas 78714-9030

Re: Whether, under chapter 42, Human Resources Code, the Texas Department of Family and Protective Services has rule-making authority to increase the number of training hours required for an employee of a day-care center or group day-care home (RQ-0868-GA)

S U M M A R Y

It is likely that a court would find that a Texas Department of Family and Protective Services ("Department") rule increasing the number of training hours set out in Human Resources Code section 42.0421(a) for an employee of a day-care center or group day-care home is within the Department's rule-making authority.

Opinion No. GA-0816

The Honorable Florence Shapiro

Chair, Committee on Education

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Ms. Virginia Porter

Dallas County Auditor

509 Main Street, Suite 407

Dallas, Texas 75202

Re: Authority of the Dallas County Commissioners Court to retain independent legal counsel in particular circumstances (RQ-0870-GA)

S U M M A R Y

Although the Dallas County Criminal District Attorney has broad authority over most criminal matters and a duty to represent the state in those matters in Dallas County, he does not have a duty to represent Dallas County in all civil matters. However, the Dallas County Criminal District Attorney does have the power to select counsel and to determine the terms and duration of the engagement where the representation will include filing or defending a suit by or against the County.

While the Dallas County Criminal District Attorney is not barred from exercising this or any other power on account of his status as a state prosecutor under the statutory provision defining and constraining that office, he is subject to ethical rules governing conflicts of interest that could preclude him from selecting counsel. Whether such a conflict exists is a matter for the Criminal District Attorney and the County Commissioners to determine in the first instance and, barring agreement, as an ancillary matter for the civil court.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201006493
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: November 10, 2010

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. **[~~Square brackets and strikethrough~~]** indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 7. LOCAL RECORDS

SUBCHAPTER D. RECORDS RETENTION SCHEDULES

13 TAC §7.125

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figures in 13 TAC §7.125 are not included in the print version of the Texas Register. The figures are available in the on-line version of the November 19, 2010, issue of the Texas Register.)

The Texas State Library and Archives Commission proposes amendments to §7.125 concerning local government retention schedules for the records Common to All Local Governments (GR) and the records of Elections and Voter Registration (EL), Public Health Agencies (HR), Property Taxation (TX), Utility Services (UT), County Clerks (CC), District Clerks (DC), Public Works and Other Government Services (PW), Public Safety Agencies (PS) and Justice and Municipal Courts (LC) pursuant to Government Code §441.158(a). The amendment is being proposed to update these retention schedules.

Jan Ferrari, director, State and Local Records, has determined that for each year of the first five years after the amended section is in effect, there will be no fiscal implications for state or local governments as a result of administering or enforcing the section. Ms. Ferrari does not anticipate either a loss of, or an increase in, revenue to state or local government as a result of the proposed amended rule.

The public benefit of the proposed amended rule is that the amended schedules will help to provide better management of records by improving retention of public records.

There will be no impact on small businesses, micro-businesses, or individuals as a result of enforcing the rule.

Written comments on the proposed rules may be submitted to Nanette Pfiester, Program Planning and Research Specialist, Box 12927, Austin, TX 78711; by fax to (512) 421-7201; or by email to nanette.pfiester@tsl.state.tx.us.

The amended section is proposed under Government Code §441.158 that grants authority to the Texas State Library and Archives Commission to provide records retention schedules to local governments and §441.160 that allows the commission to revise the schedules.

The proposed section affects Government Code §441.158 and §441.160.

§7.125. Records Retention Schedules.

~~[(a) The following records retention schedules, required to be adopted by rule under the Government Code, §441.158(a), are adopted by reference. Copies of the schedules are available from the State and Local Records Management Division, Texas State Library, P.O. Box 12927, Austin, Texas 78711-2927; (512) 421-7200.]~~

~~[(1) Local Schedule LC: Records of Justice and Municipal Courts.]~~

~~[(2) Local Schedule TX: Records of Property Taxation, 2nd Edition.]~~

~~[(3) Local Schedule EL: Records of Elections and Voter Registration.]~~

~~[(4) Local Schedule HR: Records of Public Health Agencies.]~~

~~[(5) Local Schedule UT: Records of Utility Services.]~~

(a) [~~(b)~~] The following records retention schedules, required to be adopted by rule under the Government Code, §441.158(a), are adopted.

(1) Local Schedule GR: Records Common to All Local Governments, 4th [~~3rd~~] Edition.
Figure: 13 TAC §7.125(a)(1)
[~~Figure: 13 TAC §7.125(b)(1)~~]

(2) Local Schedule PW: Records of Public Works and Other Government Services, 2nd Edition. [~~Services.~~]
Figure: 13 TAC §7.125(a)(2)
[~~Figure: 13 TAC §7.125(b)(2)~~]

(3) Local Schedule CC: Records of County Clerks, 3rd [~~2nd~~] Edition.
Figure: 13 TAC §7.125(a)(3)
[~~Figure: 13 TAC §7.125(b)(3)~~]

(4) Local Schedule DC: Records of District Clerks, 3rd [~~2nd~~] Edition.
Figure: 13 TAC §7.125(a)(4)
[~~Figure: 13 TAC §7.125(b)(4)~~]

(5) Local Schedule PS: Records of Public Safety Agencies, 3rd [~~2nd~~] Edition.
Figure: 13 TAC §7.125(a)(5)
[~~Figure: 13 TAC §7.125(b)(5)~~]

(6) Local Schedule SD: Records of Public School Districts, 2nd Edition.
Figure: 13 TAC §7.125(a)(6)
[~~Figure: 13 TAC §7.125(b)(6)~~]

(7) Local Schedule JC: Records of Public Junior Colleges, 2nd Edition.
Figure: 13 TAC §7.125(a)(7)
[~~Figure: 13 TAC §7.125(b)(7)~~]

(8) Local Schedule LC: Records of Justice and Municipal Courts, 2nd Edition.
Figure: 13 TAC §7.125(a)(8)

(9) Local Schedule TX: Records of Property Taxation, 3rd Edition.
Figure: 13 TAC §7.125(a)(9)

(10) Local Schedule EL: Records of Elections and Voter Registration, 2nd Edition.
Figure: 13 TAC §7.125(a)(10)

(11) Local Schedule HR: Records of Public Health Agencies, 2nd Edition.
Figure: 13 TAC §7.125(a)(11)

(12) Local Schedule UT: Records of Utility Services, 2nd Edition.
Figure: 13 TAC §7.125(a)(12)

(b) [~~(c)~~] The retention periods in the records retention schedules adopted under subsection (a) [~~subsections (a) and (b)~~] of this section serve to amend and replace the retention periods in all editions of the county records manual published by the commission between 1978 and 1988. The retention periods in the manual, which were validated and continued in effect by the Government Code, §441.159, until amended, are now without effect.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006267
Edward Seidenberg
Deputy Director
Texas State Library and Archive Commission
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 463-5459

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.20, §3.71

The Railroad Commission of Texas (Commission) proposes amendments to §3.20, relating to Notification of Fire Breaks, Leaks, or Blow-Outs, and §3.71, relating to Pipeline Tariffs. The Commission proposes these amendments to implement Texas Natural Resources Code, §81.056, as enacted by Senate Bill (SB) 1130 (79th Legislature (Regular Session, 2005)) and amended by House Bill (HB) 472 (81st Legislature (Regular Session, 2009)), and to consolidate pipeline reporting requirements for spills, leaks, and contamination.

The Commission proposes new §3.20(d) to move wording from §3.71(19)(A) and (C) to consolidate these two pipeline-reporting requirements under the section of the code that already includes provisions for reporting spills and leaks. The proposed new wording in §3.20(d) is substantially the same as in §3.71(19)(A) and (C), but it has been amended for clarity and to conform to *Texas Register* editorial standards.

The Commission proposes new §3.20(e) to implement the new reporting requirements of Texas Natural Resources Code, §81.056. SB 1130 amended Subchapter C, Chapter 81, Natural Resources Code, to add §81.056, relating to Contamination Report, and HB 472 amended §81.056, to re-enact the liability provisions and to permit use of money in the oil-field clean-up fund to implement the section. In general, Texas Natural Resources Code, §81.056, requires a common carrier or an owner or operator of a pipeline to report to the Commission and the landowner certain hydrocarbon contamination of soil or water observed or detected during placing, replacing, repairing, or maintaining a pipeline. That section also requires that the Commission withdraw a soil sample from the contaminated land.

Proposed new §3.20(e) follows the language contained in Texas Natural Resources Code, §81.056, with a few exceptions. Section 81.056 and proposed new §3.20(e) require a common carrier or an owner or operator of a pipeline to report to the Commission and to the owner of the land (according to tax appraisal records) any petroleum-based contamination of soil or water in proximity to a pipeline that is observed or detected during placing, repairing, replacing, or maintaining the pipeline, if hydrocarbons are present on the surface of the water, or at least five linear yards of soil have been affected by hydrocarbons, or soil affected by hydrocarbons extends beyond the face of the excavation in which the contamination is observed or detected. The common carrier or owner or operator of the pipeline must make the report within 24 hours of detection or observation and must include the global positioning satellite (GPS) coordinates of the location of contamination; the report may be made by telephone, facsimile, or electronic mail. Proposed new §3.20(e) requires that the contamination report include a description of the contamination and information that is readily available concerning the number of other pipelines in the immediate area, the name(s) of the pipeline operator(s), and the type of material transported in the pipeline(s). Texas Natural Resources Code, §81.056, and proposed new §3.20(e)(3) require the operator to provide the Commission with GPS coordinates for the location of the detected contamination.

If the entity required to report such contamination discovers the contamination late on a Friday afternoon or just before a holiday and does not know the landowner's name and contact information, the entity may not be able to obtain the tax appraisal information until the following Monday, which means that the report would be late. The Commission has been advised that most pipeline operators will have a contact name, which may not be the "first name on the appraisal roll," to whom the operator could report within the 24-hour period. Therefore, the Commission will consider the entity to be in substantial compliance with the reporting requirements if it reports the contamination to the Commission and to the known contact person within the 24-hour period *and* follows-up with a determination of, and report to, the first name on the tax appraisal rolls, if that name is different from the known contact person, as soon as the entity can verify that information.

As required by Texas Natural Resources Code, §81.056, proposed new §3.20(e) also requires that, not later that the third business day after the Commission receives the contamination report, the Commission or a person authorized by the Commission withdraw a soil sample from the contaminated land.

Proposed new §3.20(e) also requires that samples be collected, preserved, handled, and analyzed by accepted methods and states that the Commission will determine the parameters to be analyzed on a case-by-case basis, depending on the materials carried by other pipelines in the area or other possible sources of contamination in the immediate area.

Texas Natural Resources Code, §81.056, requires the Commission to adopt rules to implement the new section. Texas Natural Resources Code, §81.056(g), as added by SB 1130, prohibited the Commission from using money from the State's Oil-Field Cleanup Fund to implement this new section. However, HB 472 amended this subsection to allow the Commission to use money in the oil-field cleanup fund to implement Texas Natural Resources Code, §81.056, but restricted the amount of money from the fund that the Commission could use to implement that section to an amount not to exceed the amount of money in the fund that is derived from fees collected as organization report fees under Texas Natural Resources Code, §91.142, from common carriers or owners or operators of pipelines, as determined annually by the Commission.

The statute and proposed new §3.20(e)(1) define "common carrier" by the definition in Texas Natural Resources Code, §111.002. This definition includes owners, operators, or managers of pipelines for hire that transport crude petroleum, coal, carbon dioxide, or hydrogen. The term "owner or operator of a pipeline" is not defined in SB 1130 or HB 472; however, under Texas Natural Resources Code, §81.051, the Railroad Commission has jurisdiction over all common carrier pipelines in Texas as defined in Texas Natural Resources Code, §111.002, and over "persons owning or operating pipelines in Texas."

Texas Natural Resources Code, §81.056, and proposed new §3.20(e) define "owner of the land" or "landowner" as "the first person who is shown on the appraisal roll of the appraisal district established for the county in which a tract of land is located as owning an interest in the surface estate of the land at the time a contamination report is required to be made under this subsection."

Proposed new §3.20(e), as mandated by Texas Natural Resources Code, §81.056, would require reporting of certain information by a common carrier or owner or operator of a pipeline whenever the entity discovers petroleum-based contamination during inspection, repair, maintenance, installation, or replacement of pipelines. Currently, the Texas Natural Resources Code and the Commission's rules require pipeline operators to report to the Commission and to landowners and residents who have registered with the Commission for the purpose of notification of the release of five barrels or more of crude oil or condensate to land and the release of any amount of crude oil or condensate to water. Under the reporting requirements mandated by Texas Natural Resources Code, §81.056, common carriers and owners or operators of pipelines will be required to report petroleum hydrocarbon contamination that may or may not be caused by that operator's pipeline or other activities. In addition, the term "owner or operator of a pipeline" encompasses owners and operators of *all* pipelines, including gathering lines that transport crude oil and natural gas, and pipelines that transport refined petroleum hydrocarbons, such as gasoline or diesel, or other materials, such as hydrogen or carbon dioxide. Further, the contamination reported pursuant to Texas Natural Resources Code, §81.056, may be unreported, pre-existing contamination.

Texas Natural Resources Code, §81.056(e), as originally enacted by SB 1130, states that a common carrier or pipeline owner or operator who makes a contamination report is released from all liability for the contamination or the cleanup of the contamination covered by the report, except for any contamination caused by the common carrier or pipeline owner or operator. However, Section 2 of SB 1130 stated "Subsection (e), Section 81.056, Natural Resources Code, as added by this Act, is an exercise of authority under Subsection (c), Section 66, Article III, Texas Constitution, and takes effect only if this Act receives a vote of three-fifths of all the members elected to each house, as provided by Subsection (e) of that section." SB 1130 passed the House by a non-record vote; accordingly, it was not clear whether Texas Natural Resources Code, §81.056(e), took effect as enacted by the 79th Legislature. However, Texas Natural Resources Code, §81.056(e), clearly did become effective after the 81st Legislature passed HB 472 with a vote of greater than three-fifths of all members elected to each house. Therefore, proposed new §3.20(e)(5) states that a common carrier or pipeline owner or operator that makes a contamination report under this section is released from all liability for the contamination or the cleanup of the contamination covered by the report, except for any contamination caused by the common carrier or pipeline owner or operator.

The Commission also proposes some non-substantive amendments in both §3.20 and §3.71 to delete references to reporting by telegraph.

In late 2005, the Commission circulated for informal comment a version of proposed amendments to §3.20 and §3.71 and received numerous comments. The Commission has addressed comments regarding notification and reporting by allowing the pipeline operator to satisfy the requirement to notify the landowner by notifying the surface occupant or known contact person for the affected land if the contamination is discovered prior to a weekend or holiday, such that the information necessary to make the report to the landowner is unavailable. In that event, the common carrier or owner or operator of a pipeline may report the contamination to the Commission and to the known contact person within the 24-hour period and must follow up with a determination of, and report to, the first name on the tax appraisal rolls, if that name is different from the known contact person, as soon as the common carrier or owner or operator of the pipeline can verify the information.

The Commission received comments recommending that the Commission limit required information in the report concerning the "number of pipelines in the immediate area, their operators, type of materials being transported" to the information that can be readily obtained from visible and legible pipeline marker signs in the vicinity of the discovered contamination. The Commission declines to limit the rules as recommended because additional information may be readily available from other sources, such as the Commission's Public Geographical Information System (GIS) Map Viewer for Oil, Gas and Pipeline Data at http://www.rrc.state.tx.us/data/online/gis/index.php.

The Commission also received comments recommending that the Commission limit reporting to only contamination under the Commission's jurisdiction. Texas Natural Resources Code,

§81.056, imposes no such limit. The Commission may not infer any legislative intent to limit the required reporting.

The Commission also received comments recommending that the Commission define certain terms. Specifically, commenters recommended that the Commission define the phrase "proximity of the pipeline" to mean within the easement. The Commission agrees that the phrase should be clarified and proposes to define the phrase to mean "within the walls excavated for pipeline placement, repair, observation, or maintenance."

Commenters also recommended that the Commission define "petroleum-based contamination of soil or water that is observed or detected," "five linear yards," and "soil affected by hydrocarbons extends beyond the face of the excavation." The Commission partially agreed with this comment, and proposes to clarify the phrase "five linear yards" to mean five linear yards along the face of the excavation along the pipeline. The Commission also proposes to clarify that the phrase "soil affected by hydrocarbons extends beyond the face of the excavation" means that the hydrocarbon contamination on the excavation walls is not superficial. However, the Commission considers the phrase "petroleum-based contamination of soil or water that is observed or detected" to be sufficiently clear.

In response to other comments, the Commission finds that the proposed amendments reflect the plain language of the bills as enacted. Although the stated intent of SB 1130 was to require third-party reporting of hydrocarbon contamination discovered during maintenance, repair, or installation of a pipeline, the language of SB 1130 does not make distinctions based on who caused the hydrocarbon contamination discovered during maintenance, repair, or installation of a pipeline. Consequently, In drafting the proposed rule amendments, the Commission did not distinguish contamination attributable to third parties from contamination attributable to the party doing the maintenance, repair, or installation.

Finally, the Commission received comments recommending that the rule clearly state that the act of making a report in compliance with this rule does not create a presumption that the reporting party is responsible for the contamination, and further that the Commission will hold liable for remediation the entity determined to be responsible for the contamination based on the Commission's evidentiary findings. House Bill 472 addressed this issue and the Commission has included language concerning liability in proposed new §3.20(e)(5).

The Commission has not conducted a regulatory analysis as contemplated by Texas Government Code, §2001.0225, because the Commission has determined that the proposed amendments to §3.20 and §3.71 are not "major environmental rules" under Texas Government Code, §2001.0225(g)(3). The reporting requirements under the proposed amendments will not materially adversely affect the economy, the environment, or the health and safety of the state or a sector of the state. Additionally, the proposed amendments do not meet the applicability requirements in Texas Government Code, §2001.0225(a), because these amendments are proposed and would be adopted under a specific state statute (Texas Natural Resources Code, §81.056) rather than under the Commission's general powers.

Leslie Savage, Chief Geologist, Oil and Gas Division, has determined that for each year of the first five years the amendments as proposed would be in effect, there will be no fiscal implications for local governments and some fiscal implications for the State. The changes that will result from the proposed amendments concerning reporting of contamination by common carriers and owners and operators of pipelines are mandated by the Texas Legislature, 79th Legislative Session (Regular Session, 2005). The Commission has no way of knowing how many reports will be made each year under the new requirements; however, since SB 1130 became effective, the Commission has received only three or four reports. The Commission's Pipeline Safety section has advised that SB 1130 impacts approximately 64,216 miles of common carrier pipeline and 9,552 miles of private pipeline, for a total of 73,768 miles of pipeline. If the pipeline excavation in the vicinity of the reported contamination has been filled in between the time the report is made and the time the Commission or its authorized representative arrives to collect a sample, and if the contamination area is not physically flagged or marked, nuances of the current GPS technology could lead to a need to either re-excavate with a backhoe and/or to take several soil samples to locate and determine the extent of the reported contamination. Current Commission records indicate that the cost of backhoe rental is approximately $50 per hour and sample analysis is approximately $80 per sample, depending on the parameters to be analyzed. Because of the remote location of many pipeline routes, the Commission finds that mobilizing, locating the contamination, and demobilizing would add to the cost in many instances.

In addition, depending on the material transported by the pipeline, the investigation, assessment, control, or cleanup, if any, of the contamination would be under the jurisdiction of either the Railroad Commission or the Texas Commission on Environmental Quality (TCEQ). Because the bill does not require the operator to notify the TCEQ directly, the Commission and the TCEQ will need to develop a procedure for timely notification of the TCEQ. Any work necessary to characterize and determine the extent of and liability for contamination would be performed by staff in the Commission's Field Operations and Site Remediation sections using existing procedures for addressing spills and leaks. Commission staff, a Commission-approved contractor, or the pipeline owner or operator (upon request by that operator and approval by the Commission of the sample collection and preservation protocols) would collect the soil samples as required by Texas Natural Resources Code, §81.056. The Commission finds that Texas Natural Resources Code, §81.056, limits the Commission's use of funds from the Oil-Field Cleanup Fund to implement that statutory provision. Nothing in Texas Natural Resources Code, §81.056, affects the Commission's authority to use the Oil-Field Cleanup Fund for remediation of contamination reported to the Commission pursuant to Texas Natural Resources Code, §81.056, for which there is no responsible party, as authorized in Texas Natural Resources Code, §91.112 and §91.113, relating to Use of the Fund and Investigation, Assessment, or Cleanup by the Commission, respectively.

Ms. Savage also has determined that for each year of the first five years that the amendments would be in effect, the primary public benefit would be more efficient notice of hydrocarbon contamination of soil and water from pipelines, by requiring reporting by third parties.

The Commission estimates that the cost of compliance with the proposed amendments to §3.20 and §3.71 for individuals, small businesses, or micro-businesses will be negligible. Texas Government Code, §2006.002, relating to Adoption of Rules with Adverse Economic Effect, requires that as part of the rulemaking process, a state agency prepare an economic impact statement that assesses the potential impact of a proposed rule on small

businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule if the proposed rule will have an adverse economic effect on small businesses or micro-businesses.

The Commission's proposed amendments are anticipated to have a potential, although likely small, cost impact on those common carriers or owners or operators of pipelines that repair, replace, or maintain those pipelines. Because entities performing activities under the jurisdiction of the Commission are not required to make filings with the Commission reporting the number of employees or annual gross receipts, which are elements of the definitions of "micro-business" and "small business" in Texas Government Code, §2006.001, the Commission has no factual bases for determining whether any entities that are common carriers or owners or operators of pipelines would be classified as small businesses or micro-businesses, as those terms are defined. Specifically, Texas Government Code, §2006.001(2), defines a "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. Texas Government Code, §2006.001(1), defines "micro-business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has not more than 20 employees. For purposes of performing the analysis mandated by Texas Government Code, §2006.002(c), the Commission assumes that at least one common carrier or owner or operator of a pipeline is a small business or micro-business and would repair, replace, or maintain its pipeline.

The North American Industrial Classification System (NAICS) sets forth categories of business types. The category listed on the Texas Comptroller of Public Accounts website page entitled "HB 3430 Reporting Requirements-Determining Potential Effects on Small Businesses" that is the most suitable is business type 486110, Pipeline Transportation of Crude Oil. This industry comprises establishments primarily engaged in the pipeline transportation of crude oil. This source further indicates that 20 entities are engaged in this business, and that of those, 10 are small businesses or micro-businesses as defined in Texas Government Code, §2006.002.

For the purpose of making the analysis required by Texas Government Code, §2006.002(c), the Commission assumes that, during a given year, at least one entity that would be required to report petroleum hydrocarbon contamination under these amendments would be an individual, small business, or micro-business. The Commission also assumes that such an entity would have an existing ability to obtain the Global Positioning System (GPS) coordinates that must be reported. If the entity required to make the report under the proposed amendments knows the name of, and contact information for, the landowner who is the first person shown on the appraisal roll of the appraisal district for the county in which the tract of land on which the contamination is located, then the cost of compliance with the new reporting requirement would be the cost of determining the GPS coordinates and reporting the contamination and the coordinates to the Commission and the landowner by telephone, facsimile, or electronic mail, which costs would be negligible. If the entity required to make the report must verify the name of and contact information for the landowner as defined in the proposed amendments, then the entity would bear an additional cost of compliance to determine the name from the appraisal rolls. The Commission estimates that the cost of the reporting in this instance would be approximately $50.00.

The Commission has determined that the economic cost of the proposed amendments will be the same for small businesses and micro-businesses as for larger businesses, although the economic impact will differ based on the specific characteristics of each entity. The Commission has also determined that use of regulatory methods that will achieve the purpose of the proposed rules while minimizing the adverse impacts on small businesses is not consistent with the health, safety, and environmental and economic welfare of the state; therefore, the Commission has not prepared a regulatory flexibility analysis. Further, because the reporting requirement is statutory and Texas Natural Resources Code, §81.056, makes no distinction based on an entity's status as an individual, small business, or micro-business, the Commission does not have the authority to change the reporting requirement or to create an exception to it.

The Commission has determined that the proposed amendments will not affect a local economy; therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code, §2002.022.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. Comments should refer to O&G Docket No. 20-0267854, and will be accepted until 12:00 p.m. (noon) on Monday, December 20, 2010, which is 31 days after publication in the *Texas Register.* The Commission finds that this comment period is reasonable because the proposal and an online comment form will be available on the Commission's website no later than the day after the open meeting at which the Commission approves publication of the proposal, giving interested persons more than two additional weeks to review and analyze the proposal and to draft and submit comments. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Savage at (512) 463-7308. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.php.

The Commission proposes the amendments pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, §81.056, enacted by SB 1130 (79th Legislature (Regular Session, 2005)) and amended by HB 472 (81st Legislature (Regular Session, 2009)), which requires a common carrier or pipeline owner or operator to report to the Commission and the owner of the land on which the pipeline is located petroleum-based contamination of soil or water in proximity to the pipeline that is observed or detected in the process of placing, repairing, replacing, or maintaining the pipeline; and Texas Natural Resources Code, §91.101, which provides that to prevent the pollution of surface or subsurface water in the state, the Commission shall adopt and enforce rules relating to, among other things, the drilling of exploratory wells and oil and gas wells or any purpose in connection with them and the oper-

ation, abandonment, and proper plugging of wells subject to the jurisdiction of the Commission; and Texas Water Code, §26.131, which states that the Commission is solely responsible for the control and disposition of waste and the abatement and prevention of pollution of surface and subsurface water resulting from activities associated with the exploration, development, and production of oil or gas or geothermal resources, including activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel and any other activities regulated by the Railroad Commission of Texas pursuant to Texas Natural Resources Code, §91.101.

Texas Natural Resources Code, §§81.051, 81.052, 81.056, and 91.101; and Texas Water Code, §26.131, are affected by the proposed amendments.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, 81.056, and 91.101; and Texas Water Code, §26.131.

Cross-reference to statute: Texas Natural Resources Code, §§81.051, 81.052, 81.056, and 91.101; and Texas Water Code, §26.131.

Issued in Austin, Texas, on November 2, 2010.

§3.20. Notification of Fire Breaks, Leaks, [~~or~~] Blow-outs, or Petroleum-Based Contamination.

(a) General requirements.

(1) Operators must [~~shall~~] give immediate notice of a fire, leak, spill, or break to the appropriate commission district office electronically or by telephone [~~or telegraph~~]. Such notice must [~~shall~~] be followed by a letter giving the full description of the event, including [~~and it shall include~~] the volume of crude oil, gas, geothermal resources, other well liquids, or associated products lost.

(2) (No change.)

(b) - (c) (No change.)

(d) Reports of loss from fires, lightning, and leakage.

(1) Each pipeline operator must immediately notify the appropriate commission district office, electronically or by telephone, of each fire that occurs at any oil tank owned or controlled by the pipeline operator, or of any tank struck by lightning. Each pipeline operator must immediately report each break or leak in any of its tanks or pipelines from which more than five barrels of oil escape. Each pipeline operator must file the required information with the commission on Form H-8, Crude Oil, Gas Well Liquids, or Associated Products Loss Report, and Form H-8 Interim, if required, within 30 days from the date of discovery of the spill or leak.

(2) Each common carrier or pipeline owner or operator must mail (return receipt requested) or hand deliver to landowners (persons who have legal title to the property in question) and residents (persons whose mailing address is the property in question) of land upon which a spill or leak has occurred, copies of all spill or leak reports required by the commission for that particular spill or leak within 30 days of filing the required reports with the commission. Landowners and residents wishing to receive spill or leak reports must register with the commission, as required by Texas Natural Resources Code, §111.139, every five years, with renewal registration starting January 1, 1999. If a landowner or resident is not registered with the commission, the common carrier is not required to furnish such reports to the resident or landowner.

(e) Notification of petroleum-based contamination.

(1) The following words and terms, when used in this subsection, shall have the following meanings, unless the context clearly indicates otherwise:

(A) Common carrier--Has the meaning assigned by Texas Natural Resources Code, §111.002.

(B) Owner of the land or landowner--The first person who is shown on the appraisal roll of the appraisal district established for the county in which a tract of land is located as owning an interest in the surface estate of the land at the time a contamination report is required to be made under this subsection.

(C) Proximity of the pipeline--Within the walls excavated for pipeline placement, repair, observation, or maintenance.

(D) Soil affected by hydrocarbons extends beyond the face of the excavation--There is hydrocarbon contamination on the excavation walls that is not superficial.

(2) If in the process of placing, repairing, replacing, or maintaining a pipeline, a common carrier or an owner or operator of a pipeline observes or detects any petroleum-based contamination of soil or water in proximity to the pipeline, the common carrier or pipeline owner or operator must report the contamination to the commission and the owner of the land on which the pipeline is located. Under this subsection, a common carrier or an owner or operator of a pipeline must report petroleum-based contamination of soil or water that is observed or detected if:

(A) hydrocarbons are present on the surface of the water; or

(B) at least five linear yards of soil along the face of the excavation along the pipeline have been affected by hydrocarbons; or

(C) soil affected by hydrocarbons extends beyond the face of the excavation in which the contamination is observed or detected.

(3) The common carrier or owner or operator of a pipeline:

(A) must make a contamination report not later than 24 hours after the common carrier or pipeline owner or operator observes or detects the contamination, unless the contamination is discovered prior to a weekend or holiday, such that the information necessary to make the report to the landowner is unavailable. In that case, the common carrier or owner or operator of a pipeline may report the contamination to the commission and to the known contact person within the 24-hour period and must follow up with a determination of, and report to, the first name on the tax appraisal rolls, if that name is different from the known contact person, as soon as the common carrier or owner or operator of the pipeline can verify the information;

(B) must include the global positioning satellite (GPS) coordinates of the location of the contamination;

(C) may make the contamination report by telephone, facsimile, or electronic mail; and

(D) must include a description of the contamination discovered or observed and as much information as is readily available concerning the number of other pipelines in the immediate area, their operator(s), and the type of material transported in those pipelines.

(4) Not later than the third business day after the date the commission receives the contamination report, a person authorized by the commission must withdraw a soil sample from the contaminated land. The person is entitled to enter the land for the purpose of withdrawing the sample. The person must collect, preserve, handle, and analyze the soil sample in accordance with accepted methods. The

commission will determine on a case-by-case basis the parameters to be analyzed depending on the materials carried by pipelines in the area or other possible sources of contamination in the immediate area.

(5) In accordance with Texas Natural Resources Code, §81.056(e), as added by Acts 2005, 79th Leg., R.S., Ch. 339, Sec. 1, and re-enacted by Acts 2009, 81st Leg., R.S., Ch. 166, Sec. 1, a common carrier or pipeline owner or operator that makes a contamination report under this section is released from all liability for the contamination or the cleanup of the contamination covered by the report, except for any contamination caused by the common carrier or pipeline owner or operator.

§3.71. Pipeline Tariffs.

Every person owning, operating, or managing any pipeline, or any part of any pipeline, for the gathering, receiving, loading, transporting, storing, or delivering of crude petroleum as a common carrier shall be subject to and governed by the following provisions. Common carriers specified in this section shall be referred to as "pipelines," and the owners or shippers of crude petroleum by pipelines shall be referred to as "shippers."

(1) - (12) (No change.)

[~~(13) Telephone-telegraph line--shipper to use. If a pipeline maintains a private telegraph or telephone line, a shipper may use it without extra charge, for messages incident to shipments. However, a pipeline shall not be held liable for failure to deliver any messages away from its office or for delay in transmission or for interruption of service.~~]

(13) [~~(14)~~] Contracts of transportation. When a consignment of oil is accepted, the pipeline shall give the shipper a run ticket, and shall give the shipper a statement that shows the amount of oil received for transportation, the points of origin and destination, corrections made for temperature, deductions made for impurities, and the rate for such transportation.

(14) [~~(15)~~] Shipper's tanks, etc.--inspection. When a shipment of oil has been offered for transportation the pipeline shall have the right to go upon the premises where the oil is produced or stored, and have access to any and all tanks or storage receptacles for the purpose of making any examination, inspection, or test authorized by this section.

(15) [~~(16)~~] Offers in excess of facilities. If oil is offered to any pipeline for transportation in excess of the amount that can be immediately transported, the transportation furnished by the pipeline shall be apportioned among all shippers in proportion to the amounts offered by each; but no offer for transportation shall be considered beyond the amount which the person requesting the shipment then has ready for shipment by the pipeline. The pipeline shall be considered as a shipper of oil produced or purchased by itself and held for shipment through its line, and its oil shall be entitled to participate in such apportionate.

(16) [~~(17)~~] Interchange of tonnage. Pipelines shall provide the necessary connections and facilities for the exchange of tonnage at every locality reached by two or more pipelines, when the commission finds that a necessity exists for connection, and under such regulations as the [~~said~~] commission may determine in each case.

(17) [~~(18)~~] Receipt and delivery--necessary facilities for. Each pipeline shall install and maintain facilities for the receipt and delivery of marketable crude petroleum of shippers at any point on its line if the commission finds that a necessity exists therefor, and under regulations by the commission.

(18) [~~(19)~~] Risk of loss. [~~Reports of loss from fires, lightning, and leakage.~~]

[~~(A) Each pipeline shall immediately notify the commission district office, electronically or by telephone, of each fire that occurs at any oil tank owned or controlled by the pipeline, or of any tank struck by lightning. Each pipeline shall in like manner report each break or leak in any of its tanks or pipelines from which more than five barrels escape. Each pipeline shall file the required information with the commission in accordance with the appropriate commission form within 30 days from the date of the spill or leak.~~]

[~~(B)~~] No risk of fire, storm, flood, or act of God, and no risk resulting from riots, insurrection, rebellion, war, or act of the public enemy, or from quarantine or authority of law or any order, requisition, or necessity of the government of the United States in time of war, shall be borne by a pipeline, nor shall any liability accrue to it from any damage thereby occasioned. If loss of any crude oil from any such causes occurs after the oil has been received for transportation, and before it has been delivered to the consignee, the shipper shall bear a loss in such proportion as the amount of his shipment is to all of the oil held in transportation by the pipeline at the time of such loss, and the shipper shall be entitled to have delivered only such portion of his shipment as may remain after a deduction of his due proportion of such loss, but in such event the shipper shall be required to pay charges only on the quantity of oil delivered. This section shall not apply if the loss occurs because of negligence of the pipeline.

[~~(C) Common carrier pipelines shall mail (return receipt requested) or hand deliver to landowners (persons who have legal title to the property in question) and residents (persons whose mailing address is the property in question) of land upon which a spill or leak has occurred, all spill or leak reports required by the commission for that particular spill or leak within 30 days of filing the required reports with the commission. Registration with the commission by landowners and residents for the purpose of receiving spill or leak reports shall be required every five years, with renewal registration starting January 1, 1999. If a landowner or resident is not registered with the commission, the common carrier is not required to furnish such reports to the resident or landowner.~~]

(19) [~~(20)~~] Printing and posting. Each pipeline shall have paragraphs (1) - (18) [~~(1)-(19)~~] of this section printed on its tariff sheets, and shall post the printed sections in a prominent place in its various offices for the inspection of the shipping public. Each pipeline shall post and publish only such rules and regulations as may be adopted by the commission as general rules or such special rules as may be adopted for any particular field.

(20) [~~(21)~~] Immediately upon the publication of its tariffs, and each subsequent amendment thereof, each pipeline is requested to file one copy with the commission.

(21) [~~(22)~~] Records.

(A) Each person operating crude oil gathering, transportation, or storage facilities in the state must maintain daily records of the quantities of all crude oil moved from each oil field in the state, and such records shall also show separately for each field to whom delivery is made, and the quantities so delivered.

(B) The information contained in the records thus required to be kept must be reported to the commission by the gatherers, transporters, and handlers at such times and in such manner as may be required by the commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 2, 2010.

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Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 475-1295

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CHAPTER 4. ENVIRONMENTAL PROTECTION

The Railroad Commission of Texas (Commission) proposes amendments to §§4.204, 4.217, 4.223, 4.420, 4.620, and 4.626, relating to Definitions; General Permit Provisions; Permit Renewal; Acceptance or Rejection of an Application; Permit for Surface Disposal; and Recordkeeping, to make non-substantive corrections to cross-references to other rules within this title. The Commission proposes these amendments in conjunction with the four-year review required by Texas Government Code, §2001.039.

Leslie Savage, Chief Geologist, Oil and Gas Division, has determined that for each year of the first five years that the amendments will be in effect there will be no fiscal implications for state government. There will be no effect on local government.

The 80th Texas Legislature (2007) adopted House Bill 3430 (HB 3430), which amended Chapter 2006 of the Texas Government Code. Amended §2006.002, relating to Adoption of Rules with Adverse Economic Effect, requires that as part of the rulemaking process, a state agency prepare an Economic Impact Statement that assesses the potential impact of a proposed rule on small businesses and a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the rule if the proposed rule will have an adverse economic effect on small business. The proposed amendments are non-substantive and will have no adverse economic effect on individuals and small business.

Ms. Savage has determined that for each year of the first five years that the amendments will be in effect the public benefit will be clarification of rule titles and accurate cross-references.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. Comments should refer to O&G Docket No. 20-0267950, and will be accepted until 12:00 noon on Monday, December 20, 2010, which is 31 days after publication in the *Texas Register.* The Commission finds that this comment period is reasonable because the proposal as well as an online comment form will be available on the Commission's web site several days prior to publication of the proposal, giving interested persons additional time to review, analyze, draft, and submit comments. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Savage at (512) 463-7308. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.php.

SUBCHAPTER B. COMMERCIAL RECYCLING

16 TAC §§4.204, 4.217, 4.223

The Commission proposes the amendments pursuant to Texas Natural Resources Code, §81.051 and §81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

Texas Natural Resources Code, §81.051 and §81.052, are affected by the proposed amendments.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052.

Cross-reference to statute: Texas Natural Resources Code, §81.051 and §81.052.

Issued in Austin, Texas on November 2, 2010.

§4.204. Definitions.

Unless a word or term is defined differently in this section, the definitions in §3.8 of this title, relating to Water Protection, §3.98 of this title, relating to Standards for Management of Hazardous Oil and Gas Waste, and §4.603 of this title [~~chapter~~], relating to Definitions [~~Oil and gas NORM~~], shall apply in this subchapter. In addition, the following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (14) (No change.)

§4.217. General Permit Provisions.

(a) (No change.)

(b) A permit for a mobile or stationary commercial recycling facility issued pursuant to this subchapter shall provide that the facility may only receive, store, handle, treat, or recycle waste:

(1) - (2) (No change.)

(3) that is not oil and gas naturally occurring radioactive (NORM) waste as defined in §4.603 of this title, relating to Definitions [~~Oil and Gas Naturally Occurring Radioactive Waste~~].

(c) - (d) (No change.)

§4.223. Permit Renewal.

Before the expiration of a permit issued pursuant to this subchapter, the permittee may submit an application to renew the permit. An application for renewal of an existing permit issued pursuant to this subchapter or §3.8 of this title (relating to Water Protection) shall be submitted in writing a minimum of 60 days before the expiration date of the permit and shall include the permittee's permit number. The application shall comply with the requirements of §4.205 of this title, relating to General Permit Application Requirements for Commercial Recycling Facilities, and the notice requirements of §4.213 of this title, relating to Notice. The director may require the applicant to comply with any of the requirements of §§4.206 - 4.212 of this title, relating to Minimum Engineering and Geologic Information; Minimum Siting Information; Minimum Real Property Information; Minimum Design and Construction Information; Minimum Operating Information; Minimum Monitoring Information; and Minimum Closure Information, depending on any changes made or planned to the construction, operation, monitoring, and/or closure of the facility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 2, 2010.

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Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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SUBCHAPTER D. RAILROAD COMMISSION OF TEXAS VOLUNTARY CLEANUP PROGRAM

16 TAC §4.420

The Commission proposes the amendments pursuant to Texas Natural Resources Code, §81.051 and §81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

Texas Natural Resources Code, §81.051 and §81.052, are affected by the proposed amendments.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052.

Cross-reference to statute: Texas Natural Resources Code, §81.051 and §81.052.

Issued in Austin, Texas on November 2, 2010.

§4.420. Acceptance or Rejection of an Application.

(a) (No change.)

(b) The Commission may accept an application if it:

(1) (No change.)

(2) pertains to an eligible site, pursuant to §4.410(a) of this title [~~(relating to Eligibility for the Voluntary Cleanup Program)~~];

(3) - (6) (No change.)

(c) - (d) (No change.)

(e) If the Commission rejects an application because it is incomplete or inaccurate, then not later than the 45th day after the Site Remediation Section receives the application, the Assistant Director shall notify the applicant in writing of all information needed to make the application complete or accurate. If the applicant resubmits the application not later than the 45th day after the Assistant Director issues notice that the application has been rejected, the applicant shall not submit an additional application fee. This waiver of the application fee applies only to the first re-submission within 45 days of notice of an incomplete application. An applicant who re-submits an application after the 45th day shall submit the application fee required by §4.415(b)(3) of this title[~~, relating to Application to Participate in the Voluntary Cleanup Program~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mary Ross McDonald
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Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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SUBCHAPTER F. OIL AND GAS NORM

16 TAC §4.620, §4.626

The Commission proposes the amendments pursuant to Texas Natural Resources Code, §81.051 and §81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

Texas Natural Resources Code, §81.051 and §81.052, are affected by the proposed amendments.

Statutory authority: Texas Natural Resources Code, §81.051 and §81.052.

Cross-reference to statute: Texas Natural Resources Code, §81.051 and §81.052.

Issued in Austin, Texas on November 2, 2010.

§4.620. Permit for Surface Disposal.

(a) (No change.)

(b) Standards for permit issuance. The Commission shall issue a permit to dispose of oil and gas NORM waste under §3.8 of this title [~~(relating to Water Protection)~~] only if the Commission determines that the subject oil and gas NORM waste will be disposed of in a manner that protects public health, safety, and the environment. Any permit to dispose of oil and gas NORM waste issued pursuant to §3.8 of this title shall contain construction and operating requirements that are reasonably necessary to protect public health, safety, and the environment. In addition, the Commission shall issue a permit for burial of oil and gas NORM waste only if, prior to burial, the oil and gas NORM waste has been treated or processed so that the radioactivity concentration does not exceed 30 pCi/g Radium-226 combined with Radium-228 or 150 pCi/g of any other NORM radionuclide. The Commission shall issue a permit to dispose of oil and gas NORM waste by applying it to and mixing it with the land surface only if, after such application and mixing, the radioactivity concentration in the area where the oil and gas NORM waste was applied and mixed will not exceed 30 pCi/g Radium-226 combined with Radium-228 or 150 pCi/g of any other NORM radionuclide.

(c) NORM information. In addition to the application requirements of §3.8 of this title [~~(relating to Water Protection)~~], an applicant for surface or near-surface disposal of oil and gas NORM waste shall include the information specified in this paragraph. The Commission may require the applicant to provide any such additional information as may be necessary to show that the proposed disposal will protect public health, safety, and the environment.

(1) - (6) (No change.)

(d) Notice requirements. The applicant shall give notice of an application for a permit to dispose of oil and gas NORM waste under

this section as required in §3.8 of this title [(~~relating to Water Protection~~)] and such notice shall include the information required in subsection (c)(1) - (5) of this section.

§4.626. Recordkeeping.

(a) Retention period. A person shall retain current records relating to the radiation exposure levels of equipment and the disposal of oil and gas NORM waste for at least five years. Such records shall include the information specified in this section and in §4.605 of this title (relating to Identification of [~~Oil and Gas~~] Equipment Contaminated with NORM).

(b) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 11. SURFACE MINING AND RECLAMATION DIVISION

SUBCHAPTER C. SUBSTANTIVE RULES--URANIUM EXPLORATION AND SURFACE MINING

DIVISION 5. URANIUM EXPLORATION PERMITS AND PERMIT FEES

16 TAC §11.136

The Railroad Commission of Texas proposes new §11.136, relating to Uranium Exploration Permit Fees, to fund the regulatory program as necessary to implement the Commission's statutory authority for uranium exploration enacted by House Bill 3837, 80th Legislature (2007).

Proposed new §11.136 pertains to uranium exploration permit fees. The Commission proposes a flat fee of $5,500 for permit-application processing and for annual permit-renewal applications. The Commission will refund $4,500 of the application fee if the application is not approved. The Commission also proposes non-refundable $500 permit amendment and transfer application fees. In addition, the Commission proposes to charge permittees $45 for each borehole drilled during the 12-month permit term. Proposed new subsection (e) requires that these per-borehole fees be paid with the submission of monthly borehole casing or plugging reports (Forms SMRD-38U or SMRD-39U, respectively, that were adopted by the Commission in a separate rulemaking proceeding on October 12, 2010, and became effective on November 1, 2010).

John Caudle, Director, Surface Mining and Reclamation Division, has determined that during each year of the first five years the proposed new rule would be in effect, the net fiscal effect on state government will be minimal if not zero, because the anticipated program costs match closely with revenue expected from the proposed fee structure. Program costs for the Commission to implement the regulatory program established in HB 3837 result from continued staffing needs that require a minimum of two full-time employees, one each for uranium exploration permit review and for site inspection activities, plus operating expenses to conduct the necessary inspections. The proposed fees for exploration permitting specified in proposed new §11.136 are set at an amount that the Commission anticipates will recover the costs of the regulatory program, consistent with Texas Natural Resources Code, §131.355, which authorizes the Commission to impose fees and mandates the fee collection authorized in House Bill 3837, 80th Legislature (2007) and House Bill 1, Article VI, Railroad Commission Rider 13, 80th Legislature (2007), which requires the Commission to assess fees sufficient to generate revenue to cover the contingent general revenue appropriation.

Mr. Caudle has determined that for each year of the first five years that the proposed new rule will be in effect, the public benefit will be a fee structure for uranium exploration activities that aligns the fees paid by the uranium exploration and mining industry with the costs incurred by the Commission to implement the regulatory program established in HB 3837. In addition, Mr. Caudle has determined that for each year of the first five years the proposed new rule will be in effect, the probable increase in the economic cost of compliance to the uranium industry as a whole would be a total of $156,000. This amount is based on the Commission's estimated manpower needs and is derived from a proposed annual $5,500 permit application fee and a proposed $45 fee for each exploration borehole drilled during the annual permit term. Mr. Caudle estimates an average of 12 initial or permit renewal applications per year, with a cumulative total of 2,000 boreholes drilled per year, yielding estimated revenue of $156,000 per year.

Texas Government Code, §2006.002, relating to Adoption of Rules with Adverse Economic Effect, directs a state agency considering adoption of a rule that would have an adverse economic effect on small businesses or micro-businesses to reduce that effect if doing so is legal and feasible considering the purpose of the statute under which the rule is to be adopted. Before adopting a rule that may have an adverse economic effect on small businesses, a state agency first must prepare an economic impact statement that estimates the number of small businesses subject to the proposed rule, projects the economic impact of the rule on small businesses, and describes alternative methods of achieving the purpose of the proposed rule. The Commission's proposed new rule is anticipated to have a potential impact on those companies that perform uranium exploration in Texas. No permits have been issued for surface uranium mining since 1993.

Texas Government Code, §2006.001(2), defines a "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. Texas Government Code, §2006.001(1), defines "micro-business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has not more than 20 employees. Uranium exploration and mining companies are not required to make filings with the Commission reporting the number of employees or annual gross receipts, which are elements of the definitions of "micro-business" and

"small business" in Texas Government Code, §2006.001. Information available to the Commission indicates that the uranium exploration and mining companies operating in Texas have at least 100 employees or are companies under common control of larger companies and, therefore, do not meet two of the three elements of either definition; however, the Commission cannot conclusively determine whether any current permittee is a small business or micro-business, as those terms are defined.

The North American Industrial Classification System (NAICS) sets forth categories of business types, and the appropriate category for uranium exploration and mining is 212291 (Uranium-Radium-Vanadium Ore Mining). In the Texas NAICS on the Texas Comptroller of Public Accounts website page entitled "HB 3430 Reporting Requirements-Determining Potential Effects on Small Businesses," this category is not delineated. The most suitable category on that website is business type 212 (Mining (except oil and gas)), for which there are listed 281 companies in Texas. This source further indicates that 227 companies (81 percent) are small businesses or micro-businesses as defined in Texas Government Code, §2006.002. No further detail is provided with respect to the relative sizes of those companies.

All the exploration permits the Commission has issued since 2005 are or were held by just six companies. The Commission does not expect this scale of activities to change appreciably in the future. The Commission has determined that, based on available data, at least one of these six companies that currently would be affected by the proposed rule may meet the requirements for classification as a small business or micro-business as those terms are defined in Texas Government Code, §2006.001. Based on comments received from the Commission's previous notice of proposed rulemaking, the Commission has determined that it should adopt a conservative approach and prepare an economic impact statement that addresses the economic costs of compliance, assuming that one or more of the companies that currently are conducting exploration or that another company which may desire to conduct exploration meets these requirements.

The Commission's experience with uranium permitting under the current rules indicates that the larger companies have held several permits of a large total acreage (several thousand to tens of thousands of acres), whereas the subsidiary companies under common control of a larger company have generally conducted exploration on known prospects of a smaller size, ranging from about 200 to 1,200 acres. The proposed fee structure, however, is based on a flat application fee and a fee for each hole drilled. Neither of these fees is anticipated to significantly affect company decisions regarding the number and depth of the holes drilled. Other factors that might affect an assessment of the economic burden of regulating uranium exploration, such as net value of the mineral resource in the average explored area, cannot be directly assessed because this information is neither reported nor otherwise available to the Commission.

Despite the non-availability of data regarding the structure of the corporate entities, the Commission estimates that a permittee holding five permits annually would drill, on average, up to 200 boreholes in each permit. Under this scenario, the required permitting would result in an annual cost to the permittee of $72,500, based on the proposed fee structure. The Commission considers that such a scenario may not be likely in practice because companies normally would not conduct extensive drilling in all held permits during the same year. Therefore, a more likely scenario would be that a permittee holding as many as five permits might annually drill a total of 500 boreholes per year in the variously held permits, with the majority concentrated in one or two permit areas. In this scenario, the required permitting cost to the permittee would be $50,000 annually. This reduction would tend to introduce a downward adjustment of the fees collected annually, and is in line with the estimated program needs of approximately $152,400 per year set forth in Senate Bill 1 (81st Legislature, 2009). The Commission notes that should the revenue actually collected under this proposal be less than or significantly exceed the anticipated program revenue needs, the fee structure could be adjusted in a future rulemaking.

Another requirement under Texas Government Code, §2006.002, is for a state agency to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule that may have an adverse economic effect on a small business or micro-business. This analysis must consider using, if consistent with the health, safety, and environmental and economic welfare of the state, regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses. The state agency must include in the analysis several proposed methods of reducing the adverse impact of a proposed rule on a small business.

As set forth in HB 3837, there are two primary objectives and purposes of regulating uranium exploration through a permitting process. First, such a process includes requirements for proper reclamation of land explored for minerals to prevent undesirable land and water conditions that would be detrimental to the general welfare, health, safety, and property rights of the citizens of Texas, and thus promoting the subsequent beneficial use of the land. Second, the process ensures that exploration and surface mining operations are conducted in a manner that will prevent unreasonable degradation of land and water resources and are accomplished as contemporaneously as practicable with the exploration. Proper reclamation of land explored for minerals includes proper plugging of boreholes drilled during the conduct of exploration and reclamation of the surface disturbance, including backfilling the associated pits that were excavated during the drilling process, burying any radioactive materials exposed during exploration, leveling the surface to the approximate original contour, and re-vegetating the land. In performing the analysis mandated by Texas Government Code, §2006.002(c), the Commission recognizes that the cost of compliance with the proposed new rule would potentially represent a portion of a small business' or micro-business' exploration budget greater than a corresponding budget of a large company conducting uranium exploration. Nevertheless, the Commission must heed the statutory requirements to mitigate the potential effects to the environment and public health and safety through the administration and enforcement of the Act, regardless of the economic effects to the entity conducting the regulated activities. Therefore, the Commission has determined that the use of different regulatory methods, although they might minimize the adverse economic effects on small businesses and micro-businesses, is incompatible with the Commission's duty to protect health, safety, and environmental and economic welfare of the state, and with the Commission's obligation to the objectives set forth in the statute, as revised by HB 3837, to protect the surface-water and groundwater resources of the state.

The Commission has determined that the proposed new rule will not affect a local economy; therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code, §2002.022.

The Commission has determined that the proposed new rule in Chapter 11 is not a major environmental rule, because the rule does not meet the requirements set forth in Texas Government Code, §2001.0225(a).

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at http://www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us and should refer to SMRD Docket No. 3-10. Comments will be accepted until 12:00 noon on Monday, December 20, 2010, which is 31 days after publication in the *Texas Register.* The Commission finds that this comment period is reasonable because the proposal, as well as an online comment form, will be available on the Commission's web site no later than the day after the open meeting at which the Commission approves publication of the proposal, giving interested persons more than two additional weeks to review, analyze, and draft and submit comments. Further, a meeting with uranium industry representatives was held on September 2, 2010, regarding possible fee structures, at which time the Commission staff received input regarding industry concerns, and which resulted in the fee structure in proposed new §11.136.

The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call John Caudle, Director, Surface Mining and Reclamation Division, at (512) 463-6900. The status of all Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.php.

The Commission proposes the new rule under Texas Natural Resources Code, §131.021, which authorizes the Commission to promulgate rules pertaining to surface uranium mining and exploration operations; Texas Natural Resources Code, §131.355, which authorizes the Commission to impose fees and mandates the fee collection authorized in House Bill 3837, 80th Legislature (2007) and Senate Bill 1, Article VI, Railroad Commission Rider 13, 81st Legislature (2009), which requires the Commission to assess fees sufficient to generate revenue to cover the contingent general revenue appropriation.

Texas Natural Resources Code, §131.001, *et seq.,* as amended by House Bill 3837, 80th Legislature (2007) is affected by the proposed new rule.

Statutory authority: Texas Natural Resources Code, §131.001, *et seq.,* as amended by House Bill 3837, 80th Legislature (2007).

Cross-reference to statute: Texas Natural Resources Code, §131.001, *et seq.,* as amended by House Bill 3837, 80th Legislature (2007).

Issued in Austin, Texas on November 2, 2010.

§11.136. Uranium Exploration Permit Fees.

(a) Initial uranium exploration permit fee. Each applicant for a uranium exploration permit shall pay to the Commission a uranium exploration permit fee consisting of:

(1) a permit-application filing fee of $5,500, to be submitted with the application; and

(2) an amount equal to $45 for each exploration borehole drilled during each month of the approved 12-month permit term, non-refundable, and payable as described in subsection (e) of this section.

(b) Uranium exploration permit amendment fee. Each applicant for a uranium exploration permit amendment shall pay to the Commission a non-refundable permit amendment fee of $500.

(c) Uranium exploration permit renewal fee. Each applicant for renewal of a uranium exploration permit shall pay to the Commission a fee consisting of:

(1) a permit-application filing fee of $5,500, to be submitted with the renewal application; and

(2) an amount equal to $45 for each exploration borehole drilled during each remaining month of the approved 12-month permit term, non-refundable, and payable as described in subsection (e) of this section.

(d) Uranium exploration permit transfer fee. Each applicant for the transfer of a uranium exploration permit pursuant to §11.135 of this title (relating to Uranium Exploration Permit Transfer) shall pay to the Commission a non-refundable permit transfer application fee of $500.

(e) Schedule. Payment of the per-hole exploration borehole fee required in subsection (a) of this section shall be submitted to the Commission with the monthly borehole plugging reports (Form SMRD-39U, Borehole Plugging Report, and Form SMRD-38U, Cased Exploration Well Completion Report) filed pursuant to §11.139 of this title (relating to Uranium Exploration Drill Site Plugging and Reporting Requirements).

(f) Refunds. If a new or renewal application for uranium exploration is not approved, the Commission will refund $4,500 of the permit-application filing fee, without interest, to the applicant.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 2, 2010.

TRD-201006224
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 475-1295

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 15. NATIONAL RESEARCH UNIVERSITIES

SUBCHAPTER C. NATIONAL RESEARCH UNIVERSITY FUND

19 TAC §§15.40 - 15.44

The Texas Higher Education Coordinating Board (Coordinating Board) proposes new Subchapter C, §§15.40 - 15.44, concerning National Research University Fund. This subchapter establishes rules for eligible institutions to receive funds under the National Research University Fund, which is established to support

emerging research universities to achieve national prominence as major research universities. Authority for this subchapter is provided by Texas Education Code, §§62.145 - 62.146, which directs the Coordinating Board to adopt standards for the purposes of determining an institution's eligibility for funding from the National Research University Fund and authorizes the Board to adopt rules for the standard methods of accounting and standard methods of reporting information for the purpose of determining eligibility of institutions to receive funds under the National Research University Fund.

Dr. MacGregor M. Stephenson, Assistant Commissioner for Academic Affairs and Research, and Ms. Susan Brown, Assistant Commissioner of Planning and Accountability, have determined that for each year of the first five years the sections are in effect, there will be a fiscal implication to state government as a result of enforcing or administering the rules. One full-time equivalent staff member is needed to implement and monitor the collection of data and monitor institutional progress towards the standards identified in these rules. There will be no fiscal implication on local governments.

Dr. Stephenson and Ms. Brown have also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be to monitor progress of one or more institutions moving toward national research status. Increasing the number of national research universities is anticipated to make Texas more economically competitive, through increased research that will lead to innovative scientific discoveries and generate the establishment of new businesses and creation of new jobs. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Kevin Lemoine, Deputy Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or Kevin.Lemoine@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new sections are proposed under Texas Education Code, §§62.145 - 62.146, which give the Coordinating Board the authority to develop and implement the provisions of the National Research University Fund.

The new sections affect Texas Education Code, §§62.145 - 62.146.

§15.40. Purpose.

This subchapter establishes rules for eligible institutions to receive funds under the National Research University Fund, which is established to support emerging research universities to achieve national prominence as major research universities.

§15.41. Authority.

Authority for this subchapter is provided by Texas Education Code, §§62.145 - 62.146, which directs the Coordinating Board to adopt standards for the purposes of determining an institution's eligibility for funding from the National Research University Fund (NRUF) and authorizes the Board to adopt rules for the standard methods of accounting and standard methods of reporting information for the purpose of determining eligibility of institutions to receive funds under the NRUF.

§15.42. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Coordinating Board or Board--The Texas Higher Education Coordinating Board.

(2) Doctoral degree--An academic degree beyond the level of a master's degree that typically represents the highest level of formal study or research in a given field, e.g., a Doctor of Philosophy, Doctor of Education, Doctor of Musical Arts, Doctor of Engineering, Doctor of Public Health, Doctor of Nursing Practice.

(3) Eligible institution--A general academic teaching institution that is eligible and meets the Coordinating Board's standards to receive distributions of money under the NRUF.

(4) Emerging research university--A public institution of higher education designated as an emerging research university under the Board's accountability system.

(5) Endowment funds--Funds treated as endowment funds under the Board's accountability system.

(6) Fund--The National Research University Fund (NRUF).

(7) General academic teaching institution--As defined in Texas Education Code, §61.003.

(8) Graduate-level program--Degree programs leading to master's, professional, and/or doctoral degree.

(9) Master's degree--An academic degree that requires the successful completion of a program of study of at least 30 semester credit hours or the equivalent at the post-baccalaureate, graduate, or professional level.

(10) Master's Graduation Rate--The Master's Graduation Rate is the percent of students in an entering fall and spring cohort for a specific degree program who graduate within five years.

(11) Doctoral Graduation Rate--The Doctoral Graduation Rate is the percent of students in an entering fall cohort for a specific degree program who graduate within 10 years. Doctoral graduation rates do not include students who received a master's degree.

(12) Doctoral time to degree--Median of the total time elapsed from the start of any graduate school within the same institution to completion of the doctorate, calculated on an annual basis.

(13) Restricted funds (restricted awards)--Funds for which some external agency or organization has placed limitations on the uses for which the funds may be spent.

(14) Restricted research expenditures--Expenditures from restricted funds (restricted awards) used for research and development.

(A) Only expenditures from restricted research awards made from the following types of projects and activities and sponsored by federal, state, or local governmental agencies; private philanthropic organizations and foundations; for-profit businesses; or individuals shall be classified as restricted research expenditures:

(i) Sponsored R&D, as defined in §13.122 of this title (relating to Definitions).

(ii) Industrial Collaboration Agreements for R&D activities, as defined in §13.122 of this title.

(iii) Demonstration Projects, as defined in §13.122 of this title, which have a significant new R&D component.

(iv) Sponsored instruction and training, as defined in §13.122 of this title, for curriculum development projects when the primary purpose of the project is developing and testing an instructional or educational model through appropriate research methodologies that include data collection, evaluation, dissemination, and publication.

(v) Multiple Function Awards, as defined in §13.122 of this title, if the scope or activities of the restricted awards include R&D, these are subject to the following limitation: if the purpose of a restricted award is primarily (more than 50 percent) research, then all expenditures made from that award qualify as restricted research expenditures. If the purpose of the restricted award is not primarily research (less than 50 percent), then none of the expenditures may be counted as restricted research. Primary purpose will normally be demonstrated by more than half of the funds having been budgeted for research, but may be demonstrated by the sponsor's statement of purpose or other documented evidence.

(B) Institutions shall document the process for determining restricted research awards and shall maintain documentation justifying the rationale used to classify the awards as restricted research.

§15.43. Eligibility.

(a) The eligibility criteria for a general academic teaching institution to receive distributions from the Fund include: having an entering freshman class of high academic achievement; receiving recognition of research capabilities and scholarly attainment of the institution; having a high-quality faculty; and demonstrating commitment to high-quality graduate education.

(b) A general academic teaching institution is eligible to receive a distribution from the Fund for each year of a state fiscal biennium if:

(1) the institution is designated as an emerging research university under the coordinating board's accountability system;

(2) in each of the two state fiscal years preceding the state fiscal biennium, the institution expended at least $45 million in restricted research funds; and

(3) the institution satisfies at least four of the following six criteria:

(A) the value of the institution's endowment funds is at least $400 million;

(B) the institution awarded at least 200 doctor of philosophy degrees during each of the two academic years preceding the state fiscal biennium;

(C) in each of the two academic years preceding the state fiscal biennium, the entering freshman class of the institution demonstrated high academic achievement as reflected in the following criteria:

(i) At least 50 percent of the first-time entering freshman class students at the institution are in the top 25 percent of their high school class; or

(ii) The average SAT score of first-time entering freshman class students at or above the 75th percentile of SAT scores was equal to or greater than 1210 (consisting of the Critical Reading and Mathematics Sections) or the average ACT score of first-time entering freshman class students at or above the 75th percentile of ACT scores was equal to or greater than 26; and

(iii) The composition of the institution's first-time entering freshman class demonstrates progress toward achieving the goals of the Board's Closing the Gaps report by reflecting the population of the state or the institution's region with respect to underrepresented students and shows a commitment to improving the academic performance of underrepresented students. One way in which this could be accomplished is by active participation in one of the Federal TRIO Programs, such as having one or more McNair Scholars in a particular cohort;

(D) the institution is designated as a member of the Association of Research Libraries, has a Phi Beta Kappa chapter, or is a member of Phi Kappa Phi;

(E) in each of the two academic years preceding the state fiscal biennium, the faculty of the institution was of high quality as reflected in the following:

(i) The cumulative number of tenured/tenure-track faculty who have achieved national or international distinction through recognition as a member of one of the National Academies (including National Academy of Science, National Academy of Engineering, Academy of Arts and Sciences, and Institute of Medicine) or are Nobel Prize recipients is equal to or greater than 5; or

(ii) The annual number of tenured/tenure-track faculty who have been awarded national or international distinction during a specific state fiscal year in any of the following categories is equal to or greater than 7.

(I) American Academy of Nursing Member

(II) American Council of Learned Societies (ACLS) Fellows

(III) Beckman Young Investigators

(IV) Burroughs Wellcome Fund Career Awards

(V) Cottrell Scholars

(VI) Getty Scholars in Residence

(VII) Guggenheim Fellows

(VIII) Howard Hughes Medical Institute Investigators

(IX) Lasker Medical Research Awards

(X) MacArthur Foundation Fellows

(XI) Andrew W. Mellon Foundation Distinguished Achievement Awards

(XII) National Endowment for the Humanities (NEH) Fellows

(XIII) National Humanities Center Fellows

(XIV) National Institutes of Health (NIH) MERIT

(XV) National Medal of Science and National Medal of Technology winners

(XVI) NSF CAREER Award winners (excluding those who are also PECASE winners)

(XVII) Newberry Library Long-term Fellows

(XVIII) Pew Scholars in Biomedicine

(XIX) Pulitzer Prize Winners

(XX) Winners of the Presidential Early Career Awards for Scientists and Engineers (PECASE)

(XXI) Robert Wood Johnson Policy Fellows

(XXII) Searle Scholars

(XXIII) Sloan Research Fellows

(XXIV) Woodrow Wilson Fellows

(iii) In lieu of meeting either clause (i) or (ii) of this subparagraph, an institution may request that a comprehensive review of the faculty in five of the institution's Doctoral degree programs be conducted by external consultants selected by Coordinating Board staff in consultation with the institution and said review must demonstrate that the faculty are comparable to and competitive with faculty in similar programs at public institutions in the Association of American Universities. Costs for the review shall be borne by the institution. This review is only available if the institution has already met three of the other eligibility criteria listed in subparagraphs (A) - (D) and (F) of this paragraph;

(F) the institution has demonstrated a commitment to high-quality graduate education as reflected in the following:

(i) The number of Graduate-level programs at the institution is equal to or greater than 50; and

(ii) The institution satisfies the following criteria:

(I) The GRE scores of admitted students in five of the institution's Doctoral degree programs, as reflected in the mean Graduate Records Examination scores reported by ETS, are above national norms for the discipline;

(II) The Master's Graduation Rate at the institution is 56 percent or higher and the Doctoral Graduation Rate is 58 percent or higher;

(III) The median time to degree for Doctoral degree recipients is equal to or less than 8 years; or

(iii) In the event the institution chooses a comprehensive review of five of its Doctoral degree programs as discussed in subparagraph (E)(iii) of this paragraph, the institution must:

(I) demonstrate that the overall commitment to the Doctoral degree programs selected for this review, including the financial support for Doctoral degree students, is competitive with that of comparable high-quality programs at public institutions in the Association of American Universities; and

(II) meet clause (i) of this subparagraph and two of the three criteria in clause (ii) of this subparagraph.

§15.44. Accounting and Reporting.

(a) Emerging research universities shall report data pertaining to this subchapter according to the procedures outlined in the Coordinating Board's reporting manuals.

(b) As soon as practicable in each even-numbered year, the Coordinating Board shall certify to the legislature verified information relating to the criteria established by Texas Education Code §62.145, which are addressed in this subchapter, to be used to determine which institutions are eligible for distributions of money from the Fund.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 8, 2010.

TRD-201006405

Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 27, 2011
For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS

The Texas Board of Architectural Examiners (Board) proposes amendments to §§1.5, 1.191 and 1.192, concerning the intern development program which must be completed as a prerequisite to registration as an architect.

The amendment to §1.5, relating to Definitions, deletes the definition of the term "direct supervision." The term was used to describe the extent of the oversight a practitioner must have over an intern when obtaining the necessary experience to become registered as an architect. The standard for supervising an intern is being changed to "supervision and control" by amendment to another rule. "Direct supervision" requires close proximity between the supervisor and the intern while "supervision and control" does not. Since the term "direct supervision" will no longer be used in the rules, it is appropriate to repeal the definition. The change implements a national standard established by the National Council of Architectural Registration Boards (NCARB).

The amendment to §1.191, describing approved experience for registration by examination, is amended to change the units of credit awarded for internship experience from 700 training units to 5,600 training hours. The amount of time necessary to complete the internship remains the same but the means for measuring them are altered to training hours instead of eight-hour training units. The degree of oversight from a supervisor is changed from "direct supervision" to "supervision and control" for training settings.

The amendment to §1.192, relating to additional criteria for internship experience is amended to clarify that each new training hour is equal to one hour of acceptable experience. References to "training units" are deleted. The amendments also reduce the number of hours per week an intern must work to earn credit for training hours.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the amendments are in effect it is anticipated that the public will benefit from using the national standard for successful completion of the internship program in that it will reduce confusion for Texas registrants seeking reciprocal registration in other jurisdictions and simplify the process for licensed architects in other jurisdictions who seek registration in Texas.

Ms. Hendricks also has determined that for the first five-year period the amendments are in effect, the amendments will have no fiscal impact upon state government and no fiscal impact on local government. There will be no adverse impact on interns who are subject to the requirements of the rules. There will be no effect on small or micro businesses.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §1.5

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §1051.202 and §1051.705(a)(2), which provides authority for the Board to adopt rules as necessary to regulate the practice of architecture and to prescribe by rule standards for satisfactory experience to take the architectural registration examination.

No other statutes, articles or codes are affected by this proposal.

§1.5. Terms Defined Herein.

The following words, terms, and acronyms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) The Act--The Architects' Registration Law.

(2) Actual Signature--A personal signature of the individual whose name is signed or an authorized copy of such signature.

(3) Administrative Procedure Act (APA)--Texas Government Code §§2001.001 et seq.

(4) APA--Administrative Procedure Act.

(5) Applicant--An individual who has submitted an application for registration or reinstatement but has not yet completed the registration or reinstatement process.

(6) Architect--An individual who holds a valid Texas architectural registration certificate granted by the Board.

(7) Architect Registration Examination (ARE)--The standardized test that a Candidate must pass in order to obtain a valid Texas architectural registration certificate.

(8) Architect Registration Examination Financial Assistance Fund (AREFAF)--A program administered by the Board which provides monetary awards to Candidates and newly registered Architects who meet the program's criteria.

(9) Architects' Registration Law--Article 249a, Vernon's Texas Civil Statutes, and Chapter 1051, Texas Occupations Code.

(10) Architectural Barriers Act--Article 9102, Vernon's Texas Civil Statutes and Texas Government Code, Chapter 469.

(11) Architectural Intern--An individual enrolled in the Intern Development Program (IDP).

(12) ARE--Architect Registration Examination.

(13) AREFAF--Architect Registration Examination Financial Assistance Fund.

(14) Authorship--The state of having personally created something.

(15) Barrier-Free Design--The design of a building or a facility or the design of an alteration of a building or a facility which complies with the Texas Accessibility Standards, the Americans with Disabilities Act, the Fair Housing Accessibility Guidelines, or similarly accepted standards for accessible design.

(16) Board--Texas Board of Architectural Examiners.

(17) Cancel, Cancellation, or Cancelled--The termination of a Texas architectural registration certificate by operation of law two years after it expires without renewal by the certificate-holder.

(18) Candidate--An Applicant approved by the Board to take the ARE.

(19) EPH--Continuing Education Program Hour(s).

(20) Chair--The member of the Board who serves as the Board's presiding officer.

(21) Construction Documents--Drawings; specifications; and addenda, change orders, construction change directives, and other Supplemental Documents prepared for the purpose(s) of Regulatory Approval, permitting, or construction.

(22) Consultant--An individual retained by an Architect who prepares or assists in the preparation of technical design documents issued by the Architect for use in connection with the Architect's Construction Documents.

(23) Contested Case--A proceeding, including a licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.

(24) Continuing Education Program Hour (CEPH)--At least fifty (50) minutes of time spent in an activity meeting the Board's continuing education requirements.

(25) Council Certification--Certification granted by NCARB to architects who have satisfied certain standards related to architectural education, training, and examination.

(26) Delinquent--A registration status signifying that an Architect:

(A) has failed to remit the applicable renewal fee to the Board; and

(B) is no longer authorized to Practice Architecture in Texas or use any of the terms restricted by the Architects' Registration Law.

[~~(27) Direct Supervision--The amount of oversight by an individual overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.~~]

(27) [~~(28)~~] E-mail Directory--A listing of e-mail addresses:

(A) used to advertise architectural services; and

(B) posted on the Internet under circumstances where the Architects included in the list have control over the information included in the list.

(28) [~~(29)~~] Emeritus Architect (or Architect Emeritus)--An honorary title that may be used by an Architect who has retired from the Practice of Architecture in Texas pursuant to Texas Occupations Code, §1051.357.

(29) [~~(30)~~] Energy-Efficient Design--The design of a project and the specification of materials to minimize the consumption of energy in the use of the project. The term includes energy efficiency strategies by design as well as the incorporation of alternative energy systems.

(30) [~~(31)~~] Feasibility Study--A report of a detailed investigation and analysis conducted to determine the advisability of a proposed architectural project from a technical architectural standpoint.

(31) [~~(32)~~] Good Standing--

(A) a registration status signifying that an Architect is not delinquent in the payment of any fees owed to the Board; or

(B) an application status signifying that an Applicant or Candidate is not delinquent in the payment of any fees owed to the Board, is not the subject of a pending TBAE enforcement proceeding, and has not been the subject of formal disciplinary action by an architectural registration board that would provide a ground for the denial of the application for architectural registration in Texas.

(32) [~~(33)~~] Governmental Entity--A Texas state agency or department; a district, authority, county, municipality, or other political subdivision of Texas; or a publicly owned Texas utility.

(33) [~~(34)~~] Governmental Jurisdiction--A governmental authority such as a state, territory, or country beyond the boundaries of Texas.

(34) [~~(35)~~] IDP--The Intern Development Program as administered by NCARB.

(35) [~~(36)~~] Inactive--A registration status signifying that an Architect may not Practice Architecture in the State of Texas.

(36) [~~(37)~~] Intern Development Program (IDP)--A comprehensive internship program established, interpreted, and enforced by NCARB.

(37) [~~(38)~~] Intern Development Training Requirement--Architectural experience necessary for an Applicant to obtain architectural registration by examination in Texas.

(38) [~~(39)~~] Institutional Residential Facility--A building intended for occupancy on a 24-hour basis by persons who are receiving custodial care from the proprietors or operators of the building. Hospitals, dormitories, nursing homes and other assisted living facilities, and correctional facilities are examples of buildings that may be Institutional Residential Facilities.

(39) [~~(40)~~] Licensed--Registered.

(40) [~~(41)~~] Member Board--An architectural registration board that is part of the nonprofit federation of architectural registration boards known as NCARB.

(41) [~~(42)~~] NAAB--National Architectural Accrediting Board.

(42) [~~(43)~~] National Architectural Accrediting Board (NAAB)--An agency that accredits architectural degree programs in the United States.

(43) [~~(44)~~] National Council of Architectural Registration Boards (NCARB)--A nonprofit federation of architectural registration boards from fifty-five (55) states and territories of the United States.

(44) [~~(45)~~] NCARB--National Council of Architectural Registration Boards.

(45) [~~(46)~~] Nonregistrant--An individual who is not an Architect.

(46) [~~(47)~~] Practice Architecture--Perform or do or offer or attempt to do or perform any service, work, act, or thing within the scope of the Practice of Architecture.

(47) [~~(48)~~] Practicing Architecture--Performing or doing or offering or attempting to do or perform any service, work, act, or thing within the scope of the Practice of Architecture.

(48) [~~(49)~~] Practice of Architecture--A service or creative work applying the art and science of developing design concepts, planning for functional relationships and intended uses, and establishing the form, appearance, aesthetics, and construction details for the construction, enlargement, or alteration of a building or environs intended for human use or occupancy, the proper application of which requires education, training, and experience in those matters.

(A) The term includes:

(i) establishing and documenting the form, aesthetics, materials, and construction technology for a building, group of buildings, or environs intended to be constructed or altered;

(ii) preparing or supervising and controlling the preparation of the architectural plans and specifications that include all integrated building systems and construction details, unless otherwise permitted under Texas Occupations Code, §1051.606(a)(4); and

(iii) observing the construction, modification, or alteration of work to evaluate conformance with architectural plans and specifications described in clause (ii) of this subparagraph for any building, group of buildings, or environs requiring an architect.

(B) The term "practice of architecture" also includes the following activities which, pursuant to Texas Occupations Code §1051.701(a), may be performed by a person who is not registered as an Architect:

(i) programming for construction projects, including identification of economic, legal, and natural constraints and determination of the scope and spatial relationship of functional elements;

(ii) recommending and overseeing appropriate construction project delivery systems;

(iii) consulting, investigating, and analyzing the design, form, aesthetics, materials, and construction technology used for the construction, enlargement, or alteration of a building or environs and providing expert opinion and testimony as necessary;

(iv) research to expand the knowledge base of the profession of architecture, including publishing or presenting findings in professional forums; and

(v) teaching, administering, and developing pedagogical theory in academic settings offering architectural education.

(49) [~~(50)~~] Principal--An architect who is responsible, either alone or with other architects, for an organization's Practice of Architecture.

(50) [~~(51)~~] Prototypical--From or of an architectural design intentionally created not only to establish the architectural parameters of a building or facility to be constructed but also to serve as a functional model on which future variations of the basic architectural design would be based for use in additional locations.

(51) [~~(52)~~] Public Entity--A state, a city, a county, a city and county, a district, a department or agency of state or local government which has official or quasi-official status, an agency established by state or local government though not a department thereof but subject to some governmental control, or any other political subdivision or public corporation.

(52) [~~(53)~~] Registered--Licensed.

(53) [~~(54)~~] Registrant--Architect.

(54) [~~(55)~~] Regulatory Approval--The approval of Construction Documents by the applicable Governmental Entity after a review of the architectural content of the Construction Documents as a prerequisite to construction or occupation of a building or a facility.

(55) [~~(56)~~] Reinstatement--The procedure through which a Surrendered or revoked Texas architectural registration certificate is restored.

(56) [~~(57)~~] Renewal--The procedure through which an Architect pays a periodic fee so that the Architect's registration certificate will continue to be effective.

(57) [~~(58)~~] Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered architects applying the applicable architectural standard of care.

(58) [~~(59)~~] Revocation or Revoked--The termination of an architectural registration certificate by the Board.

(59) [~~(60)~~] Rules and Regulations of the Board--22 Texas Administrative Code §§1.1 et seq.

(60) [~~(61)~~] Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(61) [~~(62)~~] Secretary-Treasurer--The member of the Board responsible for signing the official copy of the minutes of each Board meeting and maintaining the record of Board members' attendance at Board meetings.

(62) [~~(63)~~] SOAH--State Office of Administrative Hearings.

(63) [~~(64)~~] State Office of Administrative Hearings (SOAH)--A Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings involving the executive branch of Texas government.

(64) [~~(65)~~] Supervision and Control--The amount of oversight by an architect overseeing the work of another whereby:

(A) the architect and the individual performing the work can document frequent and detailed communication with one another and the architect has both control over and detailed professional knowledge of the work; or

(B) the architect is in Responsible Charge of the work and the individual performing the work is employed by the architect or by the architect's employer.

(65) [~~(66)~~] Supplemental Document--A document that modifies or adds to the technical architectural content of an existing Construction Document.

(66) [~~(67)~~] Surrender--The act of relinquishing a Texas architectural registration certificate along with all privileges associated with the certificate.

(67) [~~(68)~~] Sustainable Design--An integrative approach to the process of design which seeks to avoid depletion of energy, water, and raw material resources; prevent environmental degradation caused by facility and infrastructure developments during their implementation and over their life cycle; and create environments that are livable and promote health, safety and well-being. Sustainability is the concept of meeting present needs without compromising the ability of future generations to meet their own needs.

(68) [~~(69)~~] TBAE--Texas Board of Architectural Examiners.

(69) [~~(70)~~] TDLR--Texas Department of Licensing and Regulation.

(70) [~~(71)~~] Texas Department of Licensing and Regulation (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(71) [~~(72)~~] Texas Guaranteed Student Loan Corporation (TGSLC)--A public, nonprofit corporation that administers the Federal Family Education Loan Program.

(72) [~~(73)~~] TGSLC--Texas Guaranteed Student Loan Corporation.

(73) [~~(74)~~] Vice-Chair--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chair, serves as the Board's presiding officer. If necessary, the Vice-Chair succeeds the Chair until a new Chair is appointed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-9040

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SUBCHAPTER J. INTERN DEVELOPMENT TRAINING REQUIREMENT

22 TAC §1.191, §1.192

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §1051.202 and §1051.705(a)(2), which provides authority for the Board to adopt rules as necessary to regulate the practice of architecture and to prescribe by rule standards for satisfactory experience to take the architectural registration examination.

No other statutes, articles or codes are affected by this proposal.

§1.191. Description of Experience Required for Registration by Examination.

(a) Pursuant to § [~~Section~~] 1.21 of this title (relating to Registration by Examination) [~~Subchapter B~~], an Applicant must successfully demonstrate completion of the Intern Development Training Requirement by earning credit for at least 5,600 Training Hours [~~700 Training Units~~] as described in this subchapter.

(b) An Applicant must earn credit for at least 2,800 Training Hours [~~350 Training Units~~] in the areas of design and construction documents in accordance with the following chart:
Figure: 22 TAC §1.191(b)

(c) An Applicant must earn credit for at least five hundred and sixty (560) Training Hours [~~seventy (70) Training Units~~] in the areas of construction administration in accordance with the following chart:
Figure: 22 TAC §1.191(c)

(d) An Applicant must earn credit for at least two hundred and eighty (280) Training Hours [~~thirty-five (35) Training Units~~] in the area of management in accordance with the following chart:

Figure: 22 TAC §1.191(d)

(e) An Applicant must earn credit for at least eighty (80) Training Hours [~~ten (10) Training Units~~] in the areas of professional and community service.

(f) An Applicant must earn credit for at least 1,880 elective Training Hours [~~235 elective Training Units~~]. Credit for elective Training Hours [~~Units~~] may be earned in any of the categories described in subsections [~~Subsections~~] (a) - [~~through~~] (e) of this section and/or in teaching, research, a post-professional degree, or other related activities.

(g) An Applicant shall receive credit for Training Hours [~~Units~~] in accordance with the following chart:
Figure: 22 TAC §1.191(g)

§1.192. Additional Criteria.

(a) One Training Hour [~~Unit~~] shall equal one hour [~~eight hours~~] of acceptable experience. Training Hours may be reported in increments of not less than .25 of an hour.

(b) An Applicant may earn credit for Training Hours [~~Units~~] only after satisfactory completion of any one of the following:

(1) three (3) years in a professional program accredited by the National Architectural Accreditation Board (NAAB) or in an architectural education program outside the United States where an evaluation by NAAB or another organization acceptable to the Board has concluded that the program is substantially equivalent to an NAAB-accredited professional program;

(2) the third year of a four-year pre-professional degree program in architecture accepted for direct entry to a two-year NAAB-accredited professional master's degree program; or

(3) one (1) year in an NAAB-accredited professional master's degree program following receipt of a non-professional degree.

(c) In order to earn credit for Training Hours [~~Units~~] in any work setting other than a post-professional degree or teaching or research, an Applicant must:

(1) work at least thirty-two (32) [~~thirty-five (35)~~] hours per week for a minimum period of eight (8) consecutive weeks; or

(2) work at least fifteen (15) [~~twenty (20)~~] hours per week for a minimum period of eight (8) consecutive weeks [~~six (6) or more consecutive months~~].

(d) To earn credit for Training Hours [~~Units~~] for teaching or research, an Applicant must be employed in the teaching or research position on a full-time basis.

(e) One year in an architectural education program shall equal thirty-two (32) semester credit hours or forty-eight (48) quarter credit hours. An Applicant may not earn credit for Training Hours [~~Units~~] for experience that was counted toward the educational requirements for architectural registration by examination.

(f) Every training activity, the setting in which it took place, and the time devoted to the activity must be verified by the person who supervised the activity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Cathy L. Hendricks, RID, ASID/IIDA
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SUBCHAPTER B. ELIGIBILITY FOR REGISTRATION

22 TAC §1.21

The Texas Board of Architectural Examiners (Board) proposes amendments to §1.21, concerning qualifications to sit for the architectural registration examination.

The amendment to §1.21 repeals provisions that exempt applicants from internship requirements if they obtained 8 years of experience before 1984 and that allow certain applicants to apply for registration under more lenient education and experience requirements that were in effect on August 31, 1999. The repeal would take effect September 1, 2011 and would have no effect upon those who apply before that date.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the amended rule is in effect it is anticipated that the public will benefit from a single standard for registration by examination and enhanced education and experience requirements for licensure.

Ms. Hendricks also has determined that for the first five-year period the amended rule is in effect, the amendment will have no fiscal impact upon state government and no fiscal impact on local government. There will be an effect upon individuals who would have qualified for more lenient standards for examination. Those individuals must either apply by the repeal date or meet current standards for registration by examination. There will be no effect on small or micro businesses.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §1051.202 and §1051.705, which provides authority for the Board to adopt rules as necessary to regulate the practice of architecture and to prescribe by rule necessary architectural education and experience standards to apply to take the registration examination.

No other statutes, articles or codes are affected by this proposal.

§1.21. Registration by Examination.

(a) In order to obtain architectural registration by examination in Texas, an Applicant:

(1) shall have a professional degree from:

(A) an architectural education program accredited by the National Architectural Accreditation Board (NAAB),

(B) an architectural education program that became accredited by NAAB not later than two years after the Applicant's graduation,

(C) an architectural education program that was granted candidacy status by NAAB and became accredited by NAAB not later than three years after the Applicant's graduation, or

(D) an architectural education program outside the United States where an evaluation by NAAB or another organization acceptable to the Board has concluded that the program is substantially equivalent to an NAAB accredited professional program;

(2) shall successfully demonstrate completion of the Intern Development Program [~~Texas Board of Architectural Examiners Intern Development Training Requirement~~]; and

(3) shall successfully complete the architectural registration examination as more fully described in Subchapter C.

(b) An Applicant who applies for architectural registration by examination on or before August 31, 2011 is [~~shall~~] not [~~be~~] required to complete the Intern Development Program [~~Texas Board of Architectural Examiners Intern Development Training Requirement~~] if the Applicant successfully demonstrates that prior to January 1, 1984, he/she acquired at least eight (8) years of acceptable architectural experience or eight (8) years of a combination of acceptable education and experience. This subsection is repealed effective September 1, 2011.

(c) An Applicant who applies for architectural registration by examination on or before August 31, 2011 and who commenced his/her architectural education or experience prior to September 1, 1999, shall be subject to the rules and regulations relating to educational and experiential requirements as they existed on August 31, 1999. This subsection is repealed effective September 1, 2011.

(d) For purposes of this section, an Applicant shall be considered to have "commenced" his/her architectural education upon enrollment in an acceptable architectural education program. This subsection is repealed effective September 1, 2011.

(e) In accordance with federal law, the Board must verify proof of legal status in the United States. Each Applicant shall provide evidence of legal status by submitting a certified copy of a United States birth certificate or other documentation that satisfies the requirements of the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. A list of acceptable documents may be obtained by contacting the Board's office.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 3. LANDSCAPE ARCHITECTS
SUBCHAPTER B. ELIGIBILITY FOR REGISTRATION

22 TAC §3.21

The Texas Board of Architectural Examiners (Board) proposes amendments to §3.21, concerning qualifications to sit for the architectural registration examination.

The amendment to §3.21 repeals a provision that allows applicants to apply for registration under more lenient education and experience requirements that were in effect on August 31, 1999, if they commenced their education or experience prior to that date. The repeal would take effect September 1, 2011, and would have no effect upon those who apply before that date.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the amended rule is in effect it is anticipated that the public will benefit from a single standard for registration by examination and enhanced education and experience requirements for licensure of all applicants. The "grandfather" provision was adopted 11 years ago when more stringent education and experience standards were put into place. The provision was intended to accommodate those who may have been anticipating licensure under pre-existing requirements and who may have been abruptly disqualified under the new standards. After the passage of a decade, the rationale for the exception is no longer present.

Ms. Hendricks also has determined that for the first five-year period the amended rule is in effect, the amendment will have no fiscal impact upon state government and no fiscal impact on local government. There will be an effect upon individuals who would have qualified for more lenient standards for examination. Those individuals must either apply prior to the effective date of repeal or meet current standards for registration by examination. There will be no effect on small or micro businesses.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §1051.202 and §1052.154, which provides authority for the Board to adopt rules as necessary to regulate the practice of landscape architecture and to prescribe by rule necessary landscape architectural education and experience prerequisites to apply to take the registration examination.

No other statutes, articles or codes are affected by this proposal.

§3.21. Registration by Examination.

(a) In order to obtain landscape architectural registration by examination in Texas, an Applicant:

(1) shall have a professional degree from:

(A) a landscape architectural education program accredited by the Landscape Architectural Accreditation Board (LAAB),

(B) a landscape architectural education program that became accredited by LAAB not later than two years after the Applicant's graduation,

(C) a landscape architectural education program that was granted candidacy status by LAAB and became accredited by LAAB not later than three years after the Applicant's graduation, or

(D) a landscape architectural education program outside the United States where an evaluation by Education Credential Evaluators or another organization acceptable to the Board has concluded that the program is substantially equivalent to an LAAB accredited professional program;

(2) shall successfully demonstrate that he/she has gained at least two (2) years' actual experience working directly under a licensed landscape architect or other experience approved by the Board pursuant to the Texas Table of Equivalents for Experience in Landscape Architecture; and

(3) shall successfully complete the landscape architectural registration examination as more fully described in Subchapter C of this chapter.

(b) An Applicant who applies for landscape architectural registration by examination on or before August 31, 2011 and who commenced his/her landscape architectural education or experience prior to September 1, 1999, is [~~shall be~~] subject to the rules and regulations relating to educational and experiential requirements as they existed on August 31, 1999. This subsection is repealed effective September 1, 2011.

(c) For purposes of this section, an Applicant shall be considered to have "commenced" his/her landscape architectural education upon enrollment in an acceptable landscape architectural education program. This subsection is repealed effective September 1, 2011.

(d) In accordance with federal law, the Board must verify proof of legal status in the United States. Each Applicant shall provide evidence of legal status by submitting a certified copy of a United States birth certificate or other documentation that satisfies the requirements of the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. A list of acceptable documents may be obtained by contacting the Board's office.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 5. REGISTERED INTERIOR DESIGNERS

The Texas Board of Architectural Examiners (Board) proposes amendments to §5.31 and §5.202, concerning educational and experience prerequisites for registration as a registered interior designer.

The amendment to §5.31, relating to Registration by Examination, deletes provisions which specify two optional detailed combinations of experience and education prerequisites for applicants who apply prior to August 31, 2010. The amendment also clarifies a provision regarding the educational prerequisites applicable to applicants who enrolled in an interior design education program after September 1, 2006, to resolve internal conflicts in the rule. The amendment repeals, effective September 1, 2011, a "grandfather" provision which maintained more lenient education and experience standards for those who commenced education or experience prior to August 31, 1999. As amended, those who apply on or before August 31, 2011, will continue to qualify for the more lenient standard. An obsolete provision for a cohort of applicants who applied for registration without examination prior to August 31, 1994 is also deleted. The amendment creates an option for applicants to fulfill experience requirements by completing the Interior Design Experience Program administered by the National Council for Interior Design Qualification or by completing the Board's preexisting two-year program.

The amendment to §5.202, describing approved experience for registration by examination, is amended to include a chart listing the substance of the experience necessary to fulfill the 3,520 hours required under the Interior Design Experience Program administered by the National Council for Interior Design Qualification. The amendments modify the Program requirements as created by the Council by requiring applicants to personally perform the listed services in lieu of observing another who performs them, except services identified as "installation" and "contractual agreements" for which an applicant may gain experience through observation. The amendments also allow applicants in the Council's Interior Design Experience Program to commence fulfilling the experience requirements before completing educational requirements. Applicants who choose to gain experience under the Board's preexisting program may do so after completing educational requirements.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the amendments are in effect it is anticipated that the public will benefit from a simplified and more uniform standard for registration by examination and enhanced education and experience requirements for licensure of all applicants. The "grandfather" provisions were adopted to avoid abruptly disqualifying potential applicants who may have been working toward licensure under pre-existing requirements. Over time, the need for the exceptions to the standards has diminished. The anticipated public benefit of giving applicants the option to complete the Interior Design Experience Program is that it would allow applicants to gain experience under a much more formal and structured process which would ensure future registrants will have a more thorough background.

Ms. Hendricks also has determined that for the first five-year period the amendments are in effect, the amendments will have no fiscal impact upon state government and no fiscal impact on local government. There will be an effect upon individuals who would have qualified for more lenient standards for examination. Those individuals must either apply prior to the effective date of repeal or meet current standards for registration by examination. Applicants who choose to fulfill experience requirements through the Council's Interior Design Experience Program will be charged a fee by the Council. Thus there will be an indeterminable fiscal impact upon applicants who opt to complete the program. However, since completing the Program is optional, the fiscal impact is not mandatory. There will be no effect on small or micro businesses.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

SUBCHAPTER B. ELIGIBILITY FOR REGISTRATION

22 TAC §5.31

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §1051.202 and §1053.155, which provides authority for the Board to adopt rules as necessary to regulate the practice of interior design and to prescribe by rule the recognition and approval of interior design educational programs and the amounts and types of professional experience necessary for registration examination eligibility.

No other statutes, articles or codes are affected by this proposal.

§5.31. Registration by Examination.

(a) In order to obtain Interior Design registration by examination in Texas, an Applicant shall demonstrate that the Applicant has a combined total of at least six years of approved Interior Design education and experience and shall successfully complete the Interior Design registration examination as more fully described in Subchapter C of this chapter. For purposes of this section, an Applicant has "approved Interior Design education" if:

(1) The Applicant graduated from:

(A) a program that has been granted professional status by the Council for Interior Design Accreditation (CIDA) or the National Architectural Accreditation Board (NAAB),

(B) a program that was granted professional status by CIDA or NAAB not later than two years after the Applicant's graduation,

(C) a program that was granted candidacy status by CIDA or NAAB and became accredited by CIDA or NAAB not later than three years after the Applicant's graduation, or

(D) an Interior Design education program outside the United States where an evaluation by World Education Services or another organization acceptable to the Board has concluded that the program is substantially equivalent to a CIDA or NAAB accredited professional program;

(2) The Applicant has a doctorate, a master's degree, or a baccalaureate degree in Interior Design;

(3) The Applicant has:

(A) A baccalaureate degree in a field other than Interior Design; and

(B) An associate's degree or a two- or three-year certificate from an Interior Design program at an institution accredited by an agency recognized by the Texas Higher Education Coordinating Board;

(4) The Applicant has:

(A) A baccalaureate degree in a field other than Interior Design; and

(B) An associate's degree or a two- or three-year certificate from a foreign Interior Design program approved or accredited by an agency acceptable to the Board;

[~~(5) The Applicant applied on or before August 31, 2010, and prior to that date, the Applicant successfully completed:~~]

[~~(A) At least six years of actual experience working under the direct supervision of a Registered Interior Designer or a registered architect;~~]

[~~(B) An associate's degree in Interior Design from an institution accredited by an agency recognized by the Texas Higher Education Coordinating Board; and~~]

[~~(C) Credit for the equivalent of at least 60 semester credit hours toward any baccalaureate degree; or~~]

[~~(6) The Applicant applied on or before August 31, 2010, and prior to that date, the Applicant successfully completed:~~]

[~~(A) At least four years of actual experience working under the direct supervision of a Registered Interior Designer or a registered architect;~~]

[~~(B) A CIDA accredited or FIDER accredited pre-professional assistant level program; and~~]

[~~(C) Credit for the equivalent of at least 60 semester credit hours toward any baccalaureate degree.~~]

(b) In order to obtain Interior Design registration by examination in Texas, an Applicant must also successfully complete the Interior Design Experience Program administered by the National Council for Interior Design Qualification or two years of approved experience as more fully described in Subchapter J of this chapter (relating to Table of Equivalents for Education and Experience in Interior Design).

(c) [~~(b)~~] The Board shall evaluate the education and experience required by subsection (a) of this section in accordance with the Table of Equivalents for Education and Experience in Interior Design.

(d) [~~(c)~~] For purposes of this section, the term "approved Interior Design education" does not include continuing education courses.

(e) [~~(d)~~] An Applicant for Interior Design registration by examination who enrolls in an Interior Design educational program [~~commences completion of the educational requirements for registration~~] after September 1, 2006, must graduate from a program described in subsection (a)(1) of this section [~~that has been granted professional status by CIDA or its predecessor, FIDER~~].

(f) [~~(e)~~] An Applicant who applies for Interior Design registration by examination on or before August 31, 2011 and who commenced his/her Interior Design education or experience prior to September 1, 1999, shall be subject to the rules and regulations relating to educational and experiential requirements as they existed on August 31, 1999. This subsection is repealed effective September 1, 2011.

[~~(f) For purposes of this section, an applicant shall be considered to have "commenced" his/her Interior Design education upon enrollment in an acceptable Interior Design education program.~~]

[~~(g) An Applicant who filed an application for registration without examination prior to August 31, 1994, is subject to the rules and regulations relating to educational and experiential requirements in effect at the time the application was filed. Such Applicant must complete the required six years of experience on or before September 1, 2003, in order to be eligible for registration without examination.~~]

(g) [~~(h)~~] In accordance with federal law, the Board must verify proof of legal status in the United States. Each Applicant shall provide evidence of legal status by submitting a certified copy of a United States birth certificate or other documentation that satisfies the requirements of the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. A list of acceptable documents may be obtained by contacting the Board's office.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201006397
Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 305-9040

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SUBCHAPTER J. TABLE OF EQUIVALENTS FOR EDUCATION AND EXPERIENCE IN INTERIOR DESIGN

22 TAC §5.202

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §1051.202 and §1053.155, which provides authority for the Board to adopt rules as necessary to regulate the practice of interior design and to prescribe by rule the recognition and approval of interior design educational programs and the amounts and types of professional experience necessary for registration examination eligibility.

No other statutes, articles or codes are affected by this proposal.

§5.202. Description of Approved Experience for Registration by Examination.

(a) Every Applicant [~~except an Applicant who completes the educational requirements pursuant to §5.31(a)(5) or §5.31(a)(6) of this title (relating to Registration by Examination)~~] must successfully demonstrate that he/she has gained a [~~the~~] minimum of two years of experience credit required for registration by examination or successfully complete the Interior Design Experience Program administered by the National Council for Interior Design Qualification. [~~in accordance with the following table:~~]
[~~Figure: 22 TAC §5.202(a)~~]

(b) An Applicant who opts to fulfill experience requirements by obtaining two years of experience credit must do so in accordance with the following table subject to the following terms and conditions:
Figure: 22 TAC §5.202(b)

(1) [~~(b)~~] An Applicant must earn at least one year of experience credit under the conditions described in category ID-7.

(2) [~~(c)~~] In order to earn credit in category ID-7 or ID-8, an Applicant must:

(A) [~~(1)~~] work at least thirty-five (35) hours per week for a minimum of ten (10) consecutive weeks; or

(B) [~~(2)~~] for half credit, work between twenty (20) and thirty-four (34) hours per week for a minimum of six (6) consecutive months.

(3) [~~(d)~~] In order to earn credit in category ID-9, an Applicant must teach subjects that are directly related to the practice of interior design. An Applicant may earn one year of credit by teaching for twenty (20) semester credit hours or thirty (30) quarter credit hours.

(4) [~~(e)~~] An Applicant may not earn credit for experience gained prior to the date the Applicant completed the educational requirements for Interior Design [~~interior design~~] registration by examination in Texas unless the applicant is fulfilling the experience requirement by completion of the Interior Design Experience Program administered by the National Council of Interior Design Qualification.

(c) An Applicant who seeks to fulfill experience requirements by successfully completing the Interior Design Experience Program administered by the National Council for Interior Design Qualification must earn credit for at least 3,520 hours in accordance with the following chart subject to the following terms and conditions:
Figure: 22 TAC §5.202(c)

(1) An Applicant may earn credit for each hour of work actually performed by the Applicant working under the Direct Supervision of a Registered Interior Designer or an architect. An Applicant may not earn credit for observing the work of another person, except as noted in Figure 22 TAC §5.202(c), items 5.d. and 6.d.

(2) An Applicant who opts to meet the experience requirements by completing the Program must file all experience records with the National Council for Interior Design Qualification and otherwise follow the procedures established by the Council to receive credit toward registration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-9040

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CHAPTER 7. ADMINISTRATION

22 TAC §7.5

The Texas Board of Architectural Examiners (Board) proposes amendments to §7.5, concerning procedures for conducting Board meetings.

The amendment to §7.5 modifies Robert's Rules of Order to conform to the customs of the Board. As amended the rule would allow agency personnel to lay out a matter for debate prior to a motion and second on the matter, allow Board members to ask questions of staff prior to a second and motion, and allow the Chair of the Board to recognize a member of the public to provide factual or technical data to the Board regarding the matter at issue.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the amended rule is in effect it is anticipated that the public will benefit from a more orderly administration of Board meetings and formal recognition of the public to provide information to the Board during discussion of a relevant issue.

Ms. Hendricks also has determined that for the first five-year period the amended rule is in effect, the amendment will have no fiscal impact upon state government and no fiscal impact on local government. There will be no impact upon licensees of the Board. There will be no effect on small or micro businesses.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §1051.202, which provides authority for the Board to adopt rules and bylaws as necessary to administer and enforce Subchapter B of the Occupations Code, regulating the practices of architecture, landscape architecture and interior design.

No other statutes, articles or codes are affected by this proposal.

§7.5. Robert's Rules of Order.

Unless required otherwise by law or this chapter, Robert's Rules of Order shall be used in the conduct of the Board's meetings, subject to the following adaptations to the rules:[~~.~~]

(1) Agency personnel may introduce a matter on the Board's agenda, prior to a motion and a second, in order to put the matter before the Board;

(2) A member of the Board, upon recognition by the Chair and without objection by another Board member, may ask agency personnel factual or technical questions about a matter before the Board, prior to a motion and second on the matter;

(3) Upon request by a member of the Board or upon the Chair's prerogative, the Chair may recognize someone who is not a member of the Board to provide factual or technical data germane to the matter currently before the Board, subject to strict limitations on relevance and time. Upon motion by a member of the Board or upon the Chair's prerogative, the Chair may reclaim the floor at any time from a person who is not a Board member.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 305-9040

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PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 75. RULES OF PRACTICE

22 TAC §75.11

The Texas Board of Chiropractic Examiners (Board) proposes an amendment to §75.11, relating to the schedule of sanctions. The Board has proposed a new rule, §80.13, which outlines requirements for the use of prepaid treatment plans by licensees. This proposed amendment to §75.11 designates a violation of new §80.13 as a Category I offense and sets the maximum sanction in accordance with that designation.

Glenn Parker, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for local government as a result of enforcing or administering the amendment. The fiscal implication for state government as a result of enforcing or administering the amendment includes increased revenue from the collection of any administrative penalties imposed in accordance with this proposed amendment.

Mr. Parker also has determined that, for each year of the first five years the amendment is in effect, the public benefit of the proposed amendment will be protection of patients entering into a prepaid treatment plan with a licensee. This proposed amendment ensures that licensees take seriously the requirements and restrictions imposed by proposed new §80.13. Mr. Parker has also determined that there will be no adverse economic effect to individuals and small or micro business during the first five years this amendment will be in effect.

Comments on the proposed amendment may be submitted to Glenn Parker, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe Street, Suite 3-825, Austin, Texas 78701; fax: (512) 305-6705, no later than 30 days from the date that this rule is published in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, §201.152, relating to rules, and §201.503, relating to schedule of sanctions. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic. Section 201.153 requires the Board to adopt a schedule of the maximum amount of sanctions that may be assessed against a licensee for each category of violation of Chapter 201 of the Occupations Code.

No other statutes, articles, or codes are affected by this proposed amendment.

§75.11. Schedule of Sanctions.

(a) (No change.)

(b) The following table contains maximum sanctions that may be assessed for each category of violation listed in the table:
Figure: 22 TAC §75.11(b)

(c) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 8, 2010.

TRD-201006409
Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 305-6716

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22 TAC §75.17

The Texas Board of Chiropractic Examiners (Board) proposes an amendment to §75.17, relating to scope of practice, to address several matters. First, in recent litigation brought by the Texas Medical Association, a district court judge identified concerns regarding subsections (d)(1)(A) and (B), relating to analysis, diagnosis, and other opinions. Second, the Board has recognized the need to define additional terms in order to improve the clarity of the rule. Third, the Board is clarifying that cosmetic treatments are not within the scope of practice. Finally, the Board is replacing some terms of art with plain language descriptions and making other minor editorial corrections to the rule.

The Board has proposed adding definitions for biomechanics, cosmetic treatment, and subluxation in subsection (b). Additionally, the Board has proposed changing the definition for subluxation complex in subsection (b) to simplify the language and make the definition more understandable. However, the Board considered an alternative definition for subluxation complex, different from that in the proposed amendment published here. The Board would like comments on this alternative definition for subluxation complex: "a subluxation which incorporates the interaction of functional and/or pathological changes in nerve, muscle, ligamentous, osseous, vascular, and connective tissue."

Additionally, the Board has proposed changes and additions to subsection (d) to provide clarity on what analysis, diagnosis, and other opinion may be rendered by a chiropractic licensee, in response to a district court judge's ruling in recent litigation involving the Board.

Finally, in subsection (e)(3) the Board has added cosmetic treatments to treatment procedures and services that are outside the scope of practice for chiropractors in Texas. This addition is in response to the Board's Enforcement Committee noticing an increase in the number of complaints involving licensees advertising and/or performing cosmetic treatments.

Glenn Parker, Executive Director, has determined that, for each year of the first five years this amendment will be in effect, there will be no additional cost to state or local governments. Mr. Parker has also determined that there will be no adverse economic effect to individuals and small or micro business during the first five years this amendment will be in effect.

Mr. Parker has also determined that, for each year of the first five years this amendment will be in effect, the public benefit of this amendment will be to clarity in the scope of practice for chiropractors in Texas.

The Board has scheduled a public hearing on these amendments for December 7, 2010, at 10:00 a.m.

Written comments on the proposed amendments may be submitted to Glenn Parker, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe Street, Tower III, Ste. 825, Austin, TX 78701; fax: (512) 305-6705, no later than thirty days from the date that this proposed amendment is published in the *Texas Register.*

These amendments are proposed under Texas Occupations Code §201.152 and §201.1525. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic. Section 201.1525 requires that the Board adopt rules clarifying what activities are included within the scope of practice of chiropractic and what activities are outside of that scope.

No other statutes, articles, or codes are affected by the proposed amendment.

§75.17. Scope of Practice.

(a) (No change.)

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board--the Texas Board of Chiropractic Examiners.

(2) Biomechanics--the movement of the spine and musculoskeletal system, including the mechanical properties of the spine and musculoskeletal system and the activation of the musculoskeletal system by the peripheral nervous system for movement, coordination, balance, stability, support, position, strengthening, and conditioning.

(3) Cosmetic treatment--a treatment that is primarily intended to address the outward appearance of an individual, such as hair removal, body sculpting, dermatological treatments, and similar treatments.

(4) [~~(2)~~] CPT Codebook--the American Medical Association's annual Current Procedural Terminology Codebook (2004). The CPT Codebook has been adopted by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services as Level I of the common procedure coding system.

(5) [~~(3)~~] Incision--A cut or a surgical wound; also, a division of the soft parts made with a knife or hot laser.

(6) [~~(4)~~] Musculoskeletal system--The system of muscles and tendons and ligaments and bones and joints and associated tissues and nerves that move the body and maintain its form.

(7) [~~(5)~~] On-site--the presence of a licensed chiropractor in the clinic, but not necessarily in the room, while a patient is undergoing an examination or treatment procedure or service.

(8) [~~(6)~~] Practice of chiropractic--the description and terms set forth under Texas Occupations Code §201.002, relating to the practice of chiropractic.

(9) Subluxation--a lesion or dysfunction in a joint or motion segment in which alignment, movement integrity, and/or physiological function are altered, although contact between joint surfaces remains intact. It is essentially a functional entity, which may influence biomechanical and neural integrity.

(10) [~~(7)~~] Subluxation complex--a neuromusculoskeletal condition that involves an aberrant relationship between two adjacent articular structures that may have functional or pathological impairments from a disease, injury, or other trauma [~~sequelae~~], causing an alteration in the biomechanical [~~and/or neuro-physiological~~] reflections of these articular structures, their proximal structures, and/or other body systems that may be directly or indirectly affected by them, including communications between the peripheral and central nervous systems.

(c) (No change.)

(d) Analysis, Diagnosis, and Other Opinions

(1) In the practice of chiropractic, licensees may render an analysis, diagnosis, or other opinion regarding the findings of examinations and evaluations. Such opinions shall be made in accordance with appropriate clinical judgment. Such opinions shall be consistent with the limitations set forth in paragraph (2) of this subsection. Such opinions could include[~~, but are not limited to, the following~~]:

(A) An analysis, diagnosis and/or other opinion regarding the biomechanical condition of the spine or musculoskeletal system including, but not limited to, the following:

(i) the health, [~~and~~] integrity, normality, or abnormality of the structures of the spine and musculoskeletal system;

(ii) the coordination, balance, efficiency, strength, conditioning and functional health, [~~and~~] integrity, normality, or abnormality of the spine and musculoskeletal system;

(iii) the existence of muculoskeletal dysfunctions or ailments or conditions resulting from those dysfunctions or ailments;

(iv) [~~(iii)~~] the existence of structural pathology, functional pathology or other abnormality of the spine and musculoskeletal system;

(v) [~~(iv)~~] the nature, severity, complicating factors and effects of said structural pathology, functional pathology, or other abnormality of the spine and musculoskeletal system;

(vi) [~~(v)~~] the etiology of said structural pathology, functional pathology or other abnormality of the spine and musculoskeletal system; and

(vii) [~~(vi)~~] the effect of said structural pathology, functional pathology or other abnormality of the spine and musculoskeletal system on the health of an individual patient or population of patients;

(B) An analysis, diagnosis or other opinion regarding a subluxation complex of the spine or musculoskeletal system including, but not limited to, the following:

(i) the nature, severity, complicating factors and effects of said subluxation complex;

(ii) the etiology of said subluxation complex; and

(iii) the effect of said subluxation complex on the health of an individual patient or population of patients;

(C) An opinion whether a patient with abnormalities, conditions, or diseases of the body may benefit from chiropractic treatment or whether a patient should be referred to another health care provider for evaluation or treatment;

(D) [~~(C)~~] An opinion regarding the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(E) [~~(D)~~] An opinion regarding the likelihood of recovery of a patient or condition under an indicated course of treatment;

(F) [~~(E)~~] An opinion regarding the risks associated with the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(G) [~~(F)~~] An opinion regarding the risks associated with not receiving the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(H) [~~(G)~~] An opinion regarding the treatment procedures that are contraindicated in the therapeutic care of a patient or condition;

~~[(H) An opinion that a patient or condition is in need of care from a medical or other class of provider;]~~

(I) An opinion regarding an individual's ability to perform normal job functions and activities of daily living, and the assessment of any disability or impairment;

(J) An opinion regarding the biomechanical risks to a patient, or patient population from various occupations, job duties or functions, activities of daily living, sports or athletics, or from the ergonomics of a given environment; and

(K) Other necessary or appropriate opinions consistent with the practice of chiropractic.

(2) Analysis, diagnosis, and other opinions regarding the findings of examinations and evaluations which are outside the scope of chiropractic include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription;

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials; or

(D) other analysis, diagnosis, and other opinions that are inconsistent with the practice of chiropractic and with the analysis, diagnosis, and other opinions described under this subsection.

(e) Treatment Procedures and Services

(1) - (2) (No change.)

(3) The treatment procedures and services [~~provided by a licensee~~] which are outside of the scope of practice include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription;

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials; [~~or~~]

(D) the use of cosmetic treatments; or

(E) [~~(D)~~] other treatment procedures and services that are inconsistent with the practice of chiropractic and with the treatment procedures and services described under this subsection.

(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
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For further information, please call: (512) 305-6716

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CHAPTER 80. PROFESSIONAL CONDUCT

22 TAC §80.13

The Texas Board of Chiropractic Examiners (Board) proposes new §80.13, relating to prepaid treatment plans, to establish guidelines for licensees offering patients prepaid treatment plans. The proposed new rule will protect the public by ensuring patients are fully aware of what is involved in the prepaid treatment plan and by allowing patients to cancel the plan with no risk of penalty, overcharging, or charging for services not rendered.

Glenn Parker, Executive Director, has determined that, for each year of the first five years this new rule will be in effect, there will be no additional cost to state or local governments.

Mr. Parker has also determined that, for each year of the first five years this new rule will be in effect, the public benefit of this new rule will be greater protection for patients entering into prepaid treatment plans. Mr. Parker has also determined that there will be no adverse economic effect to individuals and small or micro business during the first five years this new rule will be in effect.

Comments on the proposed new rule and/or a request for a public hearing on the proposed new rule may be submitted to Glenn Parker, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe Street, Tower III, Suite 825, Austin, TX 78701; fax: (512) 305-6705, no later than 30 days from the date that this proposed new rule is published in the *Texas Register.*

This new rule is proposed under Texas Occupations Code §201.152, relating to rules. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic.

No other statutes, articles, or codes are affected by the proposed new rule.

§80.13. Prepaid Treatment Plans.

(a) A licensee may accept prepayment for services planned but not yet delivered, but must provide the following:

(1) The plan must be cancellable by either party at any time for any reason without penalty of any kind to the patient.

(2) Upon cancellation of the plan the patient shall receive a complete refund of all fees paid on a pro rata basis of the number of treatments provided compared to total treatments contracted.

(3) The plan must provide for a limited, defined number of visits.

(4) The patient's file must contain the proposed treatment plan, including enumeration of all aspects of evaluation, management, and treatment planned to therapeutically benefit the patient relative to the condition determined to be present and necessitating treatment.

(A) The patient's financial file must contain documents outlining any necessary procedures for refunding unused payment amounts in the event that either the patient or the doctor discharge the other's services or therapeutic association.

(B) The treatment plan in such cases where prepayment is contracted must contain beginning and ending dates and a breakdown of the proposed treatment frequency.

(5) A contract for services and consent of treatment document must be maintained in the patient's file that specifies the condition for which the treatment plan is formulated.

(6) If nutritional products or other hard goods including braces, supports, or patient aids are to be used during the proposed treatment plan, the patient documents must state whether these items are included in the gross treatment costs or if they constitute a separate and distinct service or fee.

(b) This rule does not create any exemptions from any requirements applicable under the Texas Insurance Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Executive Director
Texas Board of Chiropractic Examiners
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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES
SUBCHAPTER D. APPLICATIONS, EXAMINATIONS, AND LICENSING

22 TAC §661.46

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.46, concerning seal and stamps used by a registered professional land surveyor.

The amendment will add language that will require an original signature and seal to be placed on electronic data that is retained by the surveyor.

Frank DiTucci, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Mr. DiTucci has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will require an original signature and seal to be placed on electronic data that is retained by the surveyor.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Frank DiTucci, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, TX 78753. Comments may also be faxed to Mr. DiTucci at the Board at (512) 239-5253 or may be sent electronically to fditucci@txls.state.tx.us. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the Executive Director not more than 30 calendar days after notice of a proposed change in the section has been published in the *Texas Register.*

The amendment is proposed pursuant to Occupations Code, Title 6, Subtitle C, §1071.151, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.46. Seal and Stamps.

At the time the applicant receives a certificate of registration/licensure, the applicant will also be instructed to secure an impression seal of the type specified by the board. As soon as the registrant has secured an impression seal, the registrant shall make an imprint thereof and shall forward said imprint to the board for its files. A rubber stamp is not considered an impression seal, but may be used at the discretion of the licensee for the purpose of this rule. A rubber stamp signature is not permitted. A registrant or licensee may place their seal and signature on electronic data at the surveyor's discretion, provided that a hard copy form is signed, sealed and retained by the surveyor and carries an original signature and seal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 3, 2010.

TRD-201006251

Frank DiTucci
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 239-5263

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22 TAC §661.55

The Texas Board of Professional Land Surveying proposes an amendment to §661.55, concerning Surveying Firms Registration, that will clarify the rule regarding furnishing contract land surveying crews.

The amendment as currently written may be unclear to registrants as to the guidelines for firms furnishing contract land surveying crews.

Frank DiTucci, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Mr. DiTucci has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will clarify the requirement for firms furnishing contract land surveying crews.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Frank DiTucci, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, TX 78753. Comments may also be faxed to Mr. DiTucci at the Board at (512) 239-5253 or may be sent electronically to fditucci@txls.state.tx.us. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the Executive Director not more than 30 calendar days after notice of a proposed change in the section has been published in the *Texas Register.*

The amendment is proposed pursuant to Occupations Code, Title 6, Subtitle C, §1071.151, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.55. Surveying Firms Registration.

(a) - (e) (No change.)

(f) Any firm furnishing contract land surveying crews <u>to persons, associations, partnerships or corporations not licensed or registered under this act</u> must have a registered professional land surveyor as a full-time employee in that firm as reflected in its registration form filed with the board. A full-time employee is an individual employed by a company in an on-going position with a minimum of 35 scheduled work hours per week, 52 weeks per year.

(g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 3, 2010.

TRD-201006252
Frank DiTucci
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 239-5263

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CHAPTER 664. CONTINUING EDUCATION

22 TAC §664.9

The Texas Board of Professional Land Surveying proposes an amendment to §664.9, concerning Acceptable Carry-over Continuing Education Units/Hours, clarifying the terminology used in the rule.

The amendment as currently written may be unclear to registrants as to what a unit is. The addition of the word "hour" will clear any confusion that may exist.

Frank DiTucci, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Mr. DiTucci has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will clarify the terminology used in the rule.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Frank DiTucci, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, TX 78753. Comments may also be faxed to Mr. DiTucci at the Board at (512) 239-5253 or may be sent electronically to fditucci@txls.state.tx.us. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the Executive Director not more than 30 calendar days after notice of a proposed change in the section has been published in the *Texas Register.*

The amendment is proposed pursuant to Occupations Code, Title 6, Subtitle C, §1071.151, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§664.9. Acceptable Carry-over Continuing Education Units<u>/Hours</u>.

If a registrant exceeds the annual requirement in any renewal period, a maximum of 8 continuing education units<u>/hours</u> may be carried forward into the subsequent renewal period.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 3, 2010.

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Frank DiTucci
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 239-5263

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 35. EMERGENCY AND TEMPORARY ORDERS AND PERMITS; TEMPORARY SUSPENSION OR AMENDMENT OF PERMIT CONDITIONS

SUBCHAPTER D. EMERGENCY SUSPENSION OF BENEFICIAL INFLOWS

30 TAC §35.101

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to amend §35.101.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

In 2007, the 80th Legislature, passed House Bill 3 (HB 3), relating to the management of the water resources of the state, including the protection of instream flows and freshwater inflows; and, Senate Bill 3 (SB 3), relating to the development, management, and preservation of the water resources of the state. HB 3/SB 3 amended Texas Water Code (TWC), §5.506 and §11.148, to provide that the commission may, in an emergency, temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards setting of TWC, §11.1471(a)(2).

The prior version of TWC, §5.506 and §11.148 already provided that the commission could suspend a water right permit condition relating to beneficial inflows to affected bays and estuaries and instream uses in an emergency where the situation could not practically be resolved in another way. The statute set out certain notice and procedural requirements. The commission had implemented the prior statute by adopting §35.101.

The purpose of this proposed amendment is to implement §§1.01, 1.02, 1.15, and 1.16 of HB 3/SB 3, relating to emergency authority to make available water set aside for beneficial inflows to affected bays and estuaries and instream uses and to provide the rules and procedures for the temporary authorization to use the set aside water and to allow the executive director to make an initial action on an emergency suspension of permit conditions or to make set aside water temporarily available without a hearing. The commission would still have to hold the subsequent hearing or refer the matter to the State Office of Administrative Hearings.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also proposes new 30 TAC Chapter 298, Environmental Flow Standards for Surface Water.

SECTION DISCUSSION

§35.101, Emergency Suspension of Permit Conditions Relating to, and Emergency Authority to Make Available Water Set Aside for, Beneficial Inflows to Affected Bays and Estuaries and In-stream Uses

The commission proposes to amend §35.101 to include emergency authorizations to temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards. The commission also proposes minor changes to make it clear that temporary authorizations to use set-asides were covered by this rule as well as the suspension of those permit conditions. Subsection (a) allows either the commission or the executive director to review or take action on an application in specific circumstances. To ensure consistency throughout §35.101 and make clear that either the commission or executive director can take the actions allowed by this section, the commission proposes to add "executive director" to the last sentence in subsection (a) and to subsections (b), (f) - (i), (k), and (n). Additionally, in subsection (e), the commission is proposing new rule language to clarify that for applications considered by the executive director the chief clerk will provide notice to the Texas Parks and Wildlife Department and the TCEQ's Public Interest Council. Further, in subsection (l), the name of Chapter 288 is corrected to add the words "Drought Contingency Plans." This proposed amendment implements HB 3/SB 3, §1.01, §1.02, §1.15, and §1.16.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst in the Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or any other unit of state or local government as a result of administration or enforcement of the proposed rule.

The purpose of the proposed rule is to implement certain provisions of HB 3/SB 3 related to agency authority in emergency situations to make water available that has been previously set aside for beneficial inflows.

Provisions in HB 3/SB 3 provide that the commission may, in an emergency, temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards setting. Prior to the passage of HB 3/SB 3, the commission already had the authority to suspend a water right permit condition relating to beneficial inflows to affected bays and estuaries and in-stream uses in an emergency where the situation could not practically be resolved in another way. The prior statute set out certain notice and procedural requirements. The purpose of this proposed amendment is to provide the rules and procedure for the temporary authorization to use the set aside water. The proposed amendment to §35.101 expands its scope to include emergency authorizations to temporarily make state water available that could be set aside under TWC, §11.1471(a)(2) and proposed Chapter 298. The notice and procedural requirements are unchanged. No fiscal implications are anticipated for the agency or any other unit of state or local government.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be to allow state water set aside from permitting in the environmental flows process and standards to be temporarily authorized for other essential beneficial uses in emergency circumstances. Public benefits could include water for human consumption, agricultural use, or any other beneficial use under TWC, §11.023.

Individuals and businesses are not expected to experience fiscal impacts as a result of the proposed rule. The proposed rule expands current agency authority by providing emergency authority that will only be utilized during extremely rare circumstances. Individuals and businesses may experience benefits by having access to water that would otherwise be unavailable. However, due to the very low number of instances in which the emergency authority is likely to be invoked, no fiscal implications are anticipated.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration or implementation of the proposed rule. The proposed rule will allow state water set aside from permitting in the environmental flows process and standards to be temporarily authorized for other essential beneficial uses in emergency circumstances. Public benefits could include water for human consumption, agricultural use, or any other beneficial use under TWC, §11.023.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is not expected to adversely affect small or micro-businesses for the first five years that it is in effect, the rule is necessary to protect public health and safety, and because the rule is required to implement state law.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of "major environmental rule" as defined in the statute.

A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed amendment is to amend §35.101 to be consistent with TWC, §5.506 and §11.148, as amended by HB 3/SB 3. The statutes were amended to provide that the commission may, in an emergency, temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards setting of TWC, §11.1471(a)(2). The purpose of this statutory amendment was to allow flexibility to use water that would otherwise be reserved for instream flows when an emergency condition requires it. The proposed amendment provides the rules and procedure to implement this emergency authority.

The proposed amendment is not a "major environmental rule" because it is not proposed to protect the environment or reduce risks to human health from environmental exposure and will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that the proposed rulemaking does not meet the definition of a major environmental rule.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed amendment to Chapter 35 and performed an assessment of whether the amendment would constitute a taking under Chapter 2007 of the Texas Government Code. The primary purpose of the proposed amendment is to provide the rules and procedure by which the commission may, in an emergency, temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards setting of TWC, §11.1471(a)(2). The proposed amendment would substantially advance this purpose by amending §35.101 to set forth the rules and procedure related to emergency authority to make available water set aside for beneficial inflows to affected bays and estuaries and instream uses and to make conforming changes to throughout the section.

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed amendment does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The amendment provides standards and procedures regarding the commission's emergency authority. These standards and procedures do not burden, restrict, or limit an owner's right to property, or reduce its value. Therefore, the rule will not constitute a taking under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rule, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on December 16, 2010, at 10:00 a.m. in Building E, Room 201 S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Natalia Henricksen, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-049-298-OW. The comment period closes December 20, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Ronald L. Ellis, Water Supply Division, (512) 239-1282.

STATUTORY AUTHORITY

This amendment is proposed under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; TWC, §5.105, which establishes the commission's authority to set policy by rule; and TWC, §5.501, which establishes the commission's authority to adopt rules necessary to administer and carry out emergency and temporary orders.

The proposed amendment implements TWC, §5.506 and §11.148.

§35.101. Emergency Suspension of Permit Conditions Relating to, and Emergency Authority to Make Available Water Set Aside for, Beneficial Inflows to Affected Bays and Estuaries and Instream Uses.

(a) The purpose of this section is to set forth the procedures and criteria to be used by the commission or the executive director in its review and action on an application by a water right holder either for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an emergency, or to make state water temporarily available that is set aside by the commission to meet the needs for freshwater inflows to affected bays and estuaries and instream uses, under Texas Water Code, §5.506 and §11.148. The emergency relief provided by this section shall only be used when the commission or executive director finds that:

(1) emergency conditions exist that present an imminent threat to the public health, safety, and welfare and that: [~~override the necessity to comply with general procedures and criteria for changing the conditions in a water right; and~~]

(A) override the necessity to comply with general procedures and criteria for changing the conditions in a water right; or

(B) override the need to maintain the balance between protecting environmental flow needs and other public interests and relevant factors; and

(2) there are no feasible, practicable alternatives to the emergency authorization.

(b) The commission or executive director may approve an application filed by the affected water right holder for the temporary suspension of all or a part of conditions in a water right relating to beneficial inflows to affected bays and estuaries and instream uses, or to make state water temporarily available that is set aside by the commission to meet the needs for freshwater inflows to affected bays and estuaries and instream uses, if the commission or executive director finds that an emergency exists and there is no feasible, practicable alternative to the suspension. The burden of demonstrating that the application should be granted in accordance with this section is on the applicant. For purposes of this section, an emergency is a condition where water supplies available to the applicant have been reduced or impaired to such an extent that an imminent peril to the public health, safety, or welfare exists. This condition may include, but not be limited to:

(1) the reduction of public water supplies to critical levels as a result of a severe and sustained drought;

(2) the failure of a dam for a public water supply reservoir;

(3) the significant contamination of a public water supply; or

(4) the failure or destruction of public water supply pipelines or other distribution systems.

(c) The application shall be filed in accordance with and must contain the information required by §35.24 of this title (relating to Application for Emergency or Temporary Order), and the following:

(1) copies of the affected permits, certificates of adjudication, or certified filings;

(2) a description of the emergency's impact on public health, safety, and welfare;

(3) a description of all existing and potential water supplies available to the applicant and their corresponding uses and costs;

(4) a summary of the examination made by the applicant of whether feasible, practicable alternatives exist to the suspension of permit conditions and reasons why those alternatives do not exist;

(5) the amount of water over and above available supplies that is [~~are~~] necessary to alleviate emergency conditions;

(6) copies of the water right holder's water conservation and drought contingency plans, if any, and a summary of their status and implementation, including the reasons why any remaining conservation or drought contingency measures provided by the plans have not or will not be implemented;

(7) a copy of the reservoir operating procedures, if applicable; and

(8) the proposed conditions and trigger levels for the suspension and reinstatement of the releases or other affected permit conditions.

(d) A copy of the application must be filed by the applicant with the Texas Parks and Wildlife Department (TPWD) at the same time it is filed with the chief clerk.

(e) For applications considered by the commission, upon [~~Upon~~] receipt of the application, the chief clerk shall provide notice of the time and location of the commission's consideration of the application to the TPWD, executive director, and public interest counsel as soon as practicable after receipt of the application, but in no event shall the petition be considered less than 72 hours after receipt of notice by the TPWD. For applications considered by the executive director, upon receipt of the application, the chief clerk shall provide notice of the date of the executive director's consideration to the TPWD and public interest counsel as soon as practicable after receipt of the application, but in no event shall the petition be considered less than 72 hours after receipt of notice by the TPWD.

(f) The TPWD, executive director, and public interest counsel shall be provided an opportunity to submit comments on the application before the commission action. The applicant shall be afforded opportunity to respond to all comments at the time of the commission's or executive director's consideration of the matter.

(g) The commission's or executive director's order shall set out the extent of any suspension, [~~and~~] any special condition upon which a suspension is granted, or the amount of any set aside made temporarily available. The commission's initial order may also indicate the referral of the matter to State Office of Administrative Hearings [~~SOAH~~] for an expedited hearing under subsection (i) of this section.

(h) Published notice of the initial action [~~suspension of water right conditions~~], if granted, shall be provided and paid for by the applicant immediately following a favorable commission or executive director initial decision by publication in a newspaper or newspapers of general circulation in the affected area. The published notice may not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. Such published notice must contain a summary of the information contained in the application as provided by subsection (c) of this section and the time and location of the subsequent commission hearing provided by subsection (i) of this section. Such publication shall occur not later than seven calendar days before this hearing. For the purposes of this rule, the affected area shall be each county, in whole or in part, downstream of the diversion point or impoundment authorized under the affected water right. The applicant shall file with the chief clerk a publisher's affidavit as proof that such notice was published in accordance with this subsection.

(i) If the commission or executive director initially grants an emergency suspension of permit conditions, or a temporary authorization, without a hearing, the commission shall hold the hearing required by §35.25 of this title (relating to Notice and Opportunity for Hearing) as soon as practicable, but in no event later than 15 days after the initial emergency suspension is granted to determine whether to affirm, modify, or set aside the initial emergency action [~~suspension~~]. Written notice of the hearing shall be provided to the TPWD and affected persons not later than ten days before the hearing.

(j) An emergency order, or temporary authorization, granted under this section may be for a period of not more than 120 days if the commission finds that emergency conditions exist that present an imminent threat to public health, safety, and welfare and that override the necessity to comply with permit conditions and there are no feasible, practicable alternatives to the emergency authorization. This emergency authorization may be renewed once for not longer than 60 days.

(k) In determining whether feasible, practicable alternatives exist to the suspension of water right conditions, the commission or executive director shall examine:

(1) the amount and purposes of use for water currently being used by the applicant;

(2) all evidence relating to the availability of alternative, supplemental water supplies to the applicant; and

(3) the applicant's efforts to curtail water use not essential for the protection of the public health, safety, and welfare.

(l) If the water right holder has a water conservation plan and/or drought contingency plan, the suspension of water right conditions, or a temporary authorization, may be contingent upon the full implementation of those plans and measures corresponding to the staged reduction of releases for existing instream uses and beneficial inflows. If the water right holder does not have a water conservation plan and drought contingency plan in accordance with Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines[~~,~~] and Requirements), the order granting an application under this section shall require the permittee to develop and implement those plans within a prescribed time period as provided in the order.

(m) In granting an application, all existing instream flows shall be passed up to that amount necessary to maintain water quality standards for the affected stream. Additional flows necessary to protect a species in accordance with the federal Endangered Species Act or other species that are considered to be of "high interest" (self-sustaining wild populations that are endemic to the affected stream, have significant scientific value, or commercial value) may also be required.

(n) In order to assist in the preparation and planning for water management during an emergency, the commission or executive director may provide conditions in a water right necessary for relief consistent with applicable portions of this section when the water right is initially granted or subsequently amended. These conditions may include, but shall not be limited to, a staged approach to the reduction in the pass-through amounts that provide for the pass-through of water for instream uses and bays and estuaries when it is available, and allow water to be captured or diverted for the protection of the public health, safety, and welfare during an emergency, subject to the protection of stream flows necessary under subsection (m) of this section for the maintenance of water quality standards. These conditions may also include full implementation by the water right holder of water conservation and drought contingency plans as a precondition for obtaining relief.

(o) If the applicant's water right already contains provisions for the temporary, total, or partial suspension of permit conditions for the maintenance of instream flows or freshwater inflows to bays and estuaries, further or different relief requested in an application submitted under this section generally will be denied unless the applicant can show new or changed circumstances or an emergency condition not contemplated when the water right condition was issued.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006382
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 239-0177

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CHAPTER 101. GENERAL AIR QUALITY RULES
SUBCHAPTER A. GENERAL RULES
30 TAC §101.1

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §101.1.

If adopted, the amendment will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rulemaking adds clarifying definitions to TCEQ rules necessary for proper implementation of new and revised federal regulations regarding the National Ambient Air Quality Standard (NAAQS) for particulate matter (PM).

On July 18, 1997, the EPA revised the NAAQS for PM to add new standards for fine particles using PM with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers ($PM_{2.5}$) as an indicator. However, at that time, certain difficulties regarding implementation of the $PM_{2.5}$ regulations remained, including the lack of necessary tools to calculate emissions of $PM_{2.5}$ and related precursors, the lack of adequate modeling techniques to project ambient impacts, and the lack of $PM_{2.5}$ monitoring sites. Therefore, on October 23, 1997, EPA issued a memorandum providing for PM with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}) to be used as a surrogate for $PM_{2.5}$. EPA reaffirmed use of the surrogate policy in a memorandum dated April 5, 2005.

On November 1, 2005, the EPA proposed regulations to implement the New Source Review (NSR) program for $PM_{2.5}$. EPA published the bulk of the major NSR program final regulations for $PM_{2.5}$ on May 16, 2008 (effective on July 15, 2008). EPA noted that this final action, with EPA's proposed rule on increments, significant impact levels (SILs), and significant monitoring concentration (SMC) when final, will represent the final elements necessary to implement a $PM_{2.5}$ PSD program. On February 11, 2010, the EPA proposed two actions that would end EPA's 1997 policy allowing sources and permitting authorities to use a demonstration of compliance with the Prevention of Significant Deterioration (PSD) requirements for PM_{10} as a surrogate for meeting the PSD requirements for $PM_{2.5}$. In the first action, the EPA proposed to repeal the "grandfathering" provision for $PM_{2.5}$ contained in the Federal PSD program, which allows applicants for proposed new major sources and major modifications that have submitted a complete PSD permit application prior to the effective date of an amendment to the PSD regulations but have not yet received final and effective PSD permit, to continue relying on information already in the application rather than immediately having to amend applications to demonstrate compliance with the new PSD requirements. In the second action, EPA also proposed to end early the PM_{10} Surrogate Policy applicable in states that have an approved PSD program in their SIP. The three-year transition period for revising the SIP and for use of the surrogate policy ends in May 2011, unless revised by EPA. In an effort to ensure the TCEQ meets regulatory requirements of the Federal Clean Air Act (FCAA), the Air Permits Division (APD) is proposing amendments to Chapters 101 and 106 to add specific definitions related to $PM_{2.5}$ regulation, and to address the known requirements for implementation.

Existing federal regulations require both major and minor NSR programs to address any pollutant for which there is a NAAQS and precursors to the formation of such pollutant when identified for regulation by the EPA. TCEQ rules outline the requirements for both major and minor NSR programs under 30 TAC §116.110 (addressing NSR applicability). This section requires any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state to obtain a permit under §116.111 or satisfy the conditions for another authorization type as listed within that section. Chapter 116, Subchapter B outlines the general requirements for both minor and major NSR permits. Specifically, §116.111 covers the general application requirements for both major and minor NSR. Minor NSR sources are required to comply with all sections of §116.111 except §116.111(a)(2)(h) and (i) which only apply to major NSR (Nonattainment and PSD).

For precursors, EPA provided some clarification regarding regulation of $PM_{2.5}$ precursors in the May 16, 2008, $PM_{2.5}$ implementation rule, stating that generally where scientific data and modeling analyses provide reasonable certainty that the pollutant's emissions are a significant contributor to ambient $PM_{2.5}$ concentrations, EPA believes that pollutant should be identified as a "regulated NSR pollutant" and subject to the $PM_{2.5}$ NSR provisions. Conversely, where the effect of a pollutant's emission on ambient $PM_{2.5}$ concentrations is subject to substantial uncertainty, such that in some circumstances, the pollutant may not result in the formation of $PM_{2.5}$, or control of the pollutant may have no effect or may even aggravate air quality, EPA generally believes it is unreasonable to establish a nationally-applicable presumption that the pollutant is a regulated NSR pollutant subject to the requirements of NSR for $PM_{2.5}$. Therefore, EPA has established certain presumptions regarding the $PM_{2.5}$ precursors, sulfur dioxide (SO_2), nitrogen oxide (NO_x), volatile organic compound (VOC) and ammonia. Specifically, EPA presumes SO_2 and NO_x to be significant contributors to ambient $PM_{2.5}$ concentrations in all areas and thus, have termed these pollutants "presumed in," meaning requiring regulation as a precursor for $PM_{2.5}$. Conversely, the final rule does not require regulation of VOC or ammonia as a precursor to $PM_{2.5}$ for the NSR program because additional research and technical tools are necessary to characterize the emissions inventories for VOC, and there is considerable uncertainty related to ammonia as a precursor. Therefore, EPA has categorized these pollutants as "presumed out," meaning not regulated as a precursor for $PM_{2.5}$ regulation. However, states have the option to exclude NO_x, as a precursor by demonstrating that NO_x, emissions are not a significant contributor to ambient $PM_{2.5}$ concentrations in a particular area. In addition, states have the option of identifying VOC and/or ammonia as precursor(s) by demonstrating that emissions for VOC and/or ammonia are a significant contributor in an area, and thus, should be subject to major NSR.

EPA has also provided clarification regarding regulation of condensable PM under the $PM_{2.5}$ regulations stating they will not require states to address condensable PM in establishing enforceable emissions limits for either PM_{10} or $PM_{2.5}$ in NSR permits during the transitional period that ends on January 1, 2011. During this transitional period, EPA is assessing the capabilities of test methods available for measuring condensable emissions. As specified in 40 Code of Regulations (CFR) Part 51, Method 202 is used in the determination of condensable particulate emissions from stationary sources, and Method 201 is used in the determination of PM_{10} emissions. It is presumed that the appropriate test method set forth by EPA once promulgated will be

provided in 40 CFR Part 51 for measuring condensable emissions.

Finally, EPA clarified that there will be no changes to the implementation of Best Available Control Technology (BACT) requirements for $PM_{2.5}$ at major sources that are subject to the PSD program. If a new major source will emit, or has the potential to emit, a significant amount of a regulated NSR pollutant in an attainment area for that pollutant, the source must apply BACT for each emissions unit that emits the pollutant. In addition, if a physical change or operational change at an existing major source will result in a significant emissions increase and significant net emissions increase of a regulated NSR pollutant, the source must apply BACT to each proposed emissions unit experiencing a net increase in emissions of that pollutant as a result of the physical or operational change in the unit. Under the $PM_{2.5}$ PSD program, these requirements will apply to direct $PM_{2.5}$ emissions; SO_2 emissions; NO_x emissions, unless states demonstrate that NO_x is not a significant contributor to ambient $PM_{2.5}$ concentrations in that area; and to VOC if identified by a state as a precursor in the $PM_{2.5}$ attainment area where the source is located. Although EPA has specified that direct emissions of $PM_{2.5}$ at or above the significant emission rate (SER) would trigger a BACT analysis, EPA has not specified whether a precursor's emissions above the precursor's SER would trigger a BACT analysis for $PM_{2.5}$ if direct emissions of $PM_{2.5}$ are below the $PM_{2.5}$ SER. Therefore it is presumed that BACT for direct $PM_{2.5}$ will apply only if direct $PM_{2.5}$ emissions are significant, and BACT for precursor pollutants will apply only if the precursor emissions equal or exceed the specific SER for the precursor pollutant.

SECTION DISCUSSION

The commission proposes to amend §101.1, Definitions, to remove Figure: 30 TAC §101.1(25) providing the de minimis impact levels for SO_2, PM_{10}, nitrogen dioxide and carbon monoxide (CO). In its place, the definition will reference 40 CFR §51.165(b)(2). 40 CFR §51.165(b)(2) provides the significance levels above which a major source or major modification would be considered to cause or contribute to a violation of the NAAQS when such source or modification would, at a minimum, exceed the listed significance levels. In addition, the commission is proposing changes to §101.1(75), which currently defines PM. The proposal will move the definition for PM_{10} from §101.1(78) to §101.1(75)(A), and add the definition for $PM_{2.5}$ under §101.1(75)(B). PM emissions is defined under §101.1(76). This section will be amended to include §101.1(76)(A) and (B), which will define direct and secondary PM emissions. $PM_{2.5}$ emissions will be defined under existing §101.1(78) when the definition for PM_{10} is moved to new §101.1(75)(A). These changes will provide the definitions for PM_{10} and $PM_{2.5}$ emissions and the definitions for direct and secondary PM emissions which currently do not exist.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rulemaking amends 30 TAC Chapters 101 and 106 to modify definitions regarding particulate matter. This fiscal note addresses the fiscal impact of definition changes to Chapter 101, and the fiscal impact of definition changes to Chapter 106 will be addressed in a separate but related fiscal note.

The proposed amendment to Chapter 101 incorporates federal regulatory requirements for the FCAA into state rules. EPA finalized $PM_{2.5}$ for the PSD program in 2008, and allowed states with approved SIPs to continue to implement a surrogate PM_{10} policy until May 2011, or until revised PSD programs for $PM_{2.5}$ were approved by EPA, whichever came first. During this time, the agency issued guidance to all regulated parties to aid them in complying with the federal regulations. The proposed rule amends the definitions in Chapter 101, General Air Quality Rules, to incorporate definitions of PM for PM_{10} and $PM_{2.5}$ as well as definitions of direct PM emissions, secondary PM emissions, and $PM_{2.5}$ emissions.

Local government and other state agencies that own or operate facilities that generate PM are not expected to experience any fiscal impact as a result of the proposed rule. All regulated entities have already been required to comply with federal law and implement BACT with regards to PM_{10} and $PM_{2.5}$. The incorporation of definitions will not require the implementation of additional controls until such time that EPA issues additional guidance.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with the FCAA and maintenance of the state's delegation authority.

The proposed rule is not expected to have a fiscal impact on individuals or businesses that own or operate facilities that emit PM Regulated entities have already been required to comply with federal regulations concerning PM and utilize BACT. The proposed rule incorporates current agency guidance and federal regulations into state regulations, and no other implementation of control technologies is required until EPA issues additional guidance.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses since they have already been required to implement BACT as a result of federal regulations and agency guidance. The proposed rule will not require implementation of other control technologies until EPA issues additional guidance.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with federal regulations.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rule does not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that a "major environmental

rule" is "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." While the purpose of this rulemaking is to increase protection of the environment and reduce risk to human health, it is not expected that this rulemaking will adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this rulemaking; and 4) the proposed rulemaking is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), which is cited in the STATUTORY AUTHORITY section.

The specific intent of the proposed rulemaking is to amend Chapter 101 to add new definitions necessary for implementation of $PM_{2.5}$ NSR regulations, and replace current definitions with references to federal definitions for efficiency. The preamble to this rulemaking clarifies how precursors and condensable emissions are addressed, that EPA has made no changes to the BACT analysis process for $PM_{2.5}$, and provides a basis for regulation of $PM_{2.5}$ emissions when the use of PM_{10} as a surrogate for $PM_{2.5}$ is no longer applicable.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an analysis of whether this proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rulemaking is to facilitate implementation of new federal regulations under the NSR program. The proposed amendment would substantially advance this stated purpose by adding new definitions to Chapter 101, necessary for implementation of the $PM_{2.5}$ regulations. The commission's analysis indicates that the Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). Specifically, EPA has promulgated new NSR regulations for $PM_{2.5}$ in accordance with 40 CFR §§52.21, 52.24, 51.160 - 51.165, 51.165(b), 51.166, and Part 51, Appendix S. TCEQ, as the administrator of the NSR program for Texas, is tasked with implementing the new federal regulations in accordance with 40 CFR §51.166 and FCAA, §107(d)(1)(A)(ii) or (iii).

Nevertheless, the commission further evaluated this proposed rule and performed an assessment of whether this proposed rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of this proposed rule is to facilitate implementation of new federal regulations under the NSR program. The proposed rule would substantially advance this stated purpose by adding new definitions to Chapter 101 of TCEQ rules, necessary for implementation of the $PM_{2.5}$ regulations.

Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rule does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendment will indirectly benefit the environment because it will require $PM_{2.5}$ emissions to be evaluated for compliance not to exceed significance levels which will ensure that there will be fewer adverse impacts to public health and the environment. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

There should be no effect on facilities subject to the Federal Operating Permits Program since APD is currently conducting reviews of sources subject to PSD and minor NSR that meet federal definitions and requirements. Permit holders may need to conduct an evaluation and determine if a revision to a Federal Operating Permit is needed to update the applicable requirements.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on December 13, 2010, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-020-101-PR. The comment period closes December 20, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Johnny Bowers, Air Permits Division, at (512) 239-6770.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; and §382.0514, concerning Sampling, Monitoring, and Certification.

This rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 382.0513, and 382.0514.

§101.1. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in the air quality rules in this title, have the following meanings, unless the context clearly indicates otherwise.

(1) Account--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) Acid gas flare--A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) Agency established facility identification number--For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that the emission inventory reporting requirements of §101.10 of this title (relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.

(4) Ambient air--That portion of the atmosphere, external to buildings, to which the general public has access.

(5) Background--Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(6) Boiler--Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Capture system--All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(8) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(9) Carbon adsorber--An add-on control device that uses activated carbon to adsorb volatile organic compounds from a gas stream.

(10) Carbon adsorption system--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(11) Coating--A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(12) Cold solvent cleaning--A batch process that uses liquid solvent to remove soils from the surfaces of parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(13) Combustion unit--Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(14) Combustion turbine--Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft will be treated as one unit.

(15) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility that disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(16) Commercial incinerator--An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(17) Commercial medical waste incinerator--A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(18) Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves that has the potential to leak volatile organic compounds.

(19) Condensate--Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(20) Construction-demolition waste--Waste resulting from construction or demolition projects.

(21) Control system or control device--Any part, chemical, machine, equipment, contrivance, or combination of same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(22) Conveyorized degreasing--A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(23) Criteria pollutant or standard--Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(24) Custody transfer--The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(25) *De minimis* impact--A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the significance levels as specified in 40 Code of Regulations (CFR) §51.165(b)(2) [~~following specified amounts~~].
[~~Figure: 30 TAC §101.1(25)~~]

(26) Domestic wastes--The garbage and rubbish normally resulting from the functions of life within a residence.

(27) Emissions banking--A system for recording emissions reduction credits so they may be used or transferred for future use.

(28) Emissions event--Any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.

(29) Emissions reduction credit--Any stationary source emissions reduction that has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(30) Emissions reduction credit certificate--The certificate issued by the executive director that indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(31) Emissions unit--Any part of a stationary source that emits, or would have the potential to emit, any pollutant subject to regulation under the Federal Clean Air Act.

(32) Excess opacity event--When an opacity reading is equal to or exceeds 15 additional percentage points above an applicable opacity limit, averaged over a six-minute period.

(33) Exempt solvent--Those carbon compounds or mixtures of carbon compounds used as solvents that have been excluded from the definition of volatile organic compound.

(34) External floating roof--A cover or roof in an open top tank that rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them.

(35) Federal motor vehicle regulation--Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(36) Federally enforceable--All limitations and conditions that are enforceable by the United States Environmental Protection Agency administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under 40 CFR §52.21 or under regulations approved under 40 CFR Part 51, Subpart 1, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(37) Flare--An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and that is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(38) Fuel oil--Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(39) Fugitive emission--Any gaseous or particulate contaminant entering the atmosphere that could not reasonably pass

through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(40) Garbage--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(41) Gasoline--Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater that is produced for use as a motor fuel, and is commonly called gasoline.

(42) Hazardous wastes--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.,* as amended.

(43) Heatset (used in offset lithographic printing)--Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(44) High-bake coatings--Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(45) High-volume low-pressure spray guns--Equipment used to apply coatings by means of a spray gun that operates between 0.1 and 10.0 pounds per square inch gauge air pressure measured at the air cap.

(46) Incinerator--An enclosed combustion apparatus and attachments that is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device that burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period is considered to be an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually is also considered to be an incinerator. An open-trench type (with closed ends) combustion unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any rule within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(47) Industrial boiler--A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(48) Industrial furnace--Cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and other devices the commission may list.

(49) Industrial solid waste--Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 and §335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class 3 Waste Determination).

(50) Internal floating cover--A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(51) Leak--A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower; or the dripping or exuding of process fluid based on sight, smell, or sound.

(52) Liquid fuel--A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(53) Liquid-mounted seal--A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(54) Maintenance area--A geographic region of the state previously designated nonattainment under the Federal Clean Air Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under 42 United States Code, §7505a. The following are the maintenance areas within the state:

(A) Victoria Ozone Maintenance Area 60 (*Federal Register* (FR) 12453) - Victoria County; and

(B) Collin County Lead Maintenance Area (64 FR 55421) - Portion of Collin County. Eastside: Starting at the intersection of South Fifth Street and the fence line approximately 1,000 feet south of the Exide property line going north to the intersection of South Fifth Street and Eubanks Street; Northside: Proceeding west on Eubanks to the Burlington Railroad tracks; Westside: Along the Burlington Railroad tracks to the fence line approximately 1,000 feet south of the Exide property line; Southside: Fence line approximately 1,000 feet south of the Exide property line.

(55) Maintenance plan--A revision to the applicable state implementation plan, meeting the requirements of 42 United States Code, §7505a.

(56) Marine vessel--Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(57) Mechanical shoe seal--A metal sheet that is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(58) Medical waste--Waste materials identified by the Department of State Health Services as "special waste from health care-related facilities" and those waste materials commingled and discarded with special waste from health care-related facilities.

(59) Metropolitan Planning Organization--That organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 United States Code (USC), §134 and 49 USC, §1607.

(60) Mobile emissions reduction credit--The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state rules) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter F of this title (relating to Vehicle Retirement and Mobile Emission Reduction Credits), and that has been banked in accordance with Subchapter H, Division 1 of this chapter.

(61) Motor vehicle--A self-propelled vehicle designed for transporting persons or property on a street or highway.

(62) Motor vehicle fuel dispensing facility--Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(63) Municipal solid waste--Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste except industrial solid waste.

(64) Municipal solid waste facility--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(65) Municipal solid waste landfill--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 Code of Federal Regulations §257.2. A municipal solid waste landfill (MSWLF) unit also may receive other types of Resource Conservation and Recovery Act Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(66) National ambient air quality standard--Those standards established under 42 United States Code, §7409, including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(67) Net ground-level concentration--The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(68) New source--Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(69) Nitrogen oxides (NO_x)--The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(70) Nonattainment area--A defined region within the state that is designated by the United States Environmental Protection Agency (EPA) as failing to meet the national ambient air quality standard for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of 42 United States Code, §7407(d). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations Part 81 and pertinent Federal Register (FR) notices. The following areas comprise the nonattainment areas within the state for all national ambient air quality standards (NAAQS). EPA has indicated that it will revoke the one-hour ozone standard in full, including the associated designations and classifications, on June 15, 2005, which is one year following the effective date of the designations for the eight-hour NAAQS of June 15, 2004.

(A) Carbon monoxide (CO). El Paso CO nonattainment area (56 FR 56694)--Classified as a Moderate CO nonattainment area with a design value less than or equal to 12.7 parts per million. Portion of El Paso County. Portion of the city limits of El Paso: That portion of the City of El Paso bounded on the north by Highway 10 from Porfirio Diaz Street to Raynolds Street, Raynolds Street from Highway 10 to the Southern Pacific Railroad lines, the Southern Pacific Railroad lines from Raynolds Street to Highway 62, Highway 62 from the Southern Pacific Railroad lines to Highway 20, and Highway 20 from Highway 62 to Polo Inn Road. Bounded on the east by Polo Inn Road from Highway 20 to the Texas-Mexico border. Bounded on the south by the Texas-Mexico border from Polo Inn Road to Porfirio Diaz Street. Bounded on the west by Porfirio Diaz Street from the Texas-Mexico border to Highway 10.

(B) Inhalable particulate matter (PM_{10}). El Paso PM_{10} nonattainment area (56 FR 56694)--Classified as a Moderate PM_{10} nonattainment area. Portion of El Paso County that comprises the El Paso city limit boundaries as they existed on November 15, 1990.

(C) Lead. No designated nonattainment areas.

(D) Nitrogen dioxide. No designated nonattainment areas.

(E) Ozone (one-hour).

(i) Houston-Galveston-Brazoria (HGB) one-hour ozone nonattainment area (56 FR 56694) - Classified as a Severe-17 ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) El Paso one-hour ozone nonattainment area (56 FR 56694) - Classified as a Serious ozone nonattainment area. Consists of El Paso County.

(iii) Beaumont-Port Arthur (BPA) one-hour ozone nonattainment area (69 FR 16483) - Classified as a Serious ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iv) Dallas-Fort Worth one-hour ozone nonattainment area (63 FR 8128) - Classified as a Serious ozone nonattainment area. Consists of Collin, Dallas, Denton, and Tarrant Counties.

(F) Ozone (eight-hour).

(i) HGB eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Moderate ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) BPA eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Marginal ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iii) Dallas-Fort Worth eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Moderate ozone nonattainment area. Consists of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(iv) San Antonio eight-hour ozone nonattainment area (69 FR 23936) - Classified under the Federal Clean Air Act, Title I, Part D, Subpart 1 (42 United States Code, §7502), nonattainment deferred to September 30, 2005, or as extended by EPA.

(G) Sulfur dioxide. No designated nonattainment areas.

(71) Non-reportable emissions event--Any emissions event that in any 24-hour period does not result in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(72) Opacity--The degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(73) Open-top vapor degreasing--A batch solvent cleaning process that is open to the air and that uses boiling solvent to create solvent vapor used to clean or dry parts through condensation of the hot solvent vapors on the parts.

(74) Outdoor burning--Any fire or smoke-producing process that is not conducted in a combustion unit.

(75) Particulate matter--Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(A) Particulate matter with diameters less than 10 micrometers (PM_{10})--Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on 40 Code of Federal Regulations (CFR) Part 50, Appendix J, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(B) Particulate matter with diameters less than 2.5 micrometers ($PM_{2.5}$)--Particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers as measured by a reference method based on 40 CFR Part 50, Appendix L, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(76) Particulate matter emissions--All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by United States Environmental Protection Agency Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(A) Direct PM emissions--Particulate matter that is emitted directly into the air as a solid or liquid particle (e.g. elemental carbon from diesel engines or fire activities, or condensable organic particles from gasoline engines).

(B) Secondary PM emissions--Particulate matter that is formed in the atmosphere as a result of various chemical reactions (e.g. sulfate and nitrate).

(77) Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(78) $PM_{2.5}$ emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan. [~~PM_{10} --Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on 40 Code of Federal Regulations (CFR) Part 50, Appendix J, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.~~]

(79) PM_{10} emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(80) Polychlorinated biphenyl compound--A compound subject to 40 Code of Federal Regulations Part 761.

(81) Process or processes--Any action, operation, or treatment embracing chemical, commercial, industrial, or manufacturing factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(82) Process weight per hour--"Process weight" is the total weight of all materials introduced or recirculated into any specific process that may cause any discharge of air contaminants into the atmosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, excluding any time during that the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(83) Property--All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(84) Reasonable further progress--Annual incremental reductions in emissions of the applicable air contaminant that are sufficient to provide for attainment of the applicable national ambient air quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(85) Regulated entity--All regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used

in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flowlines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation of emissions events.

(86) Remote reservoir cold solvent cleaning--Any cold solvent cleaning operation in which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(87) Reportable emissions event--Any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(88) Reportable quantity (RQ)--Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures by name or Chemical Abstracts Service (CAS) number, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) Part 302, Table 302.4, the column "final RQ";

(II) listed in 40 CFR Part 355, Appendix A, the column "Reportable Quantity"; or

(III) listed as follows:

(-a-) acetaldehyde - 1,000 pounds, except in the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-b-) butanes (any isomer) - 5,000 pounds;

(-c-) butenes (any isomer, except 1,3-butadiene) - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-d-) carbon monoxide - 5,000 pounds;

(-e-) 1-chloro-1,1-difluoroethane (HCFC-142b) - 5,000 pounds;

(-f-) chlorodifluoromethane (HCFC-22) - 5,000 pounds;

(-g-) 1-chloro-1-fluoroethane (HCFC-151a) - 5,000 pounds;

(-h-) chlorofluoromethane (HCFC-31) - 5,000 pounds;

(-i-) chloropentafluoroethane (CFC-115) - 5,000 pounds;

(-j-) 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124) - 5,000 pounds;

(-k-) 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a) - 5,000 pounds;

(-l-) 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee) - 5,000 pounds;

(-m-) decanes (any isomer) - 5,000 pounds;

(-n-) 1,1-dichloro-1-fluoroethane (HCFC-141b) - 5,000 pounds;

(-o-) 3,3-dichloro-1,1,2,2-pentafluoropropane (HCFC-225ca) - 5,000 pounds;

(-p-) 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb) - 5,000 pounds;

(-q-) 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFR-114) - 5,000 pounds;

(-r-) 1,1-dichlorotetrafluoroethane (CFC-114a) - 5,000 pounds;

(-s-) 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a) - 5,000 pounds;

(-t-) 1,1-difluoroethane (HFC-152a) - 5,000 pounds;

(-u-) difluoromethane (HFC-32) - 5,000 pounds;

(-v-) ethanol - 5,000 pounds;

(-w-) ethylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-x-) ethylfluoride (HFC-161) - 5,000 pounds;

(-y-) 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea) - 5,000 pounds;

(-z-) 1,1,1,3,3,3-hexafluoropropane (HFC-236fa) - 5,000 pounds;

(-aa-) 1,1,1,2,3,3-hexafluoropropane (HFC-236ea) - 5,000 pounds;

(-bb-) hexanes (any isomer) - 5,000 pounds;

(-cc-) isopropyl alcohol - 5,000 pounds;

(-dd-) mineral spirits - 5,000 pounds;

(-ee-) octanes (any isomer) - 5,000 pounds;

(-ff-) oxides of nitrogen - 200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County, and 5,000 pounds in all other areas of the state, which should be used instead of the RQs for nitrogen oxide and nitrogen dioxide provided in 40 CFR Part 302, Table 302.4, the column "final RQ";

(-gg-) pentachlorofluoroethane (CFR-111) - 5,000 pounds;

(-hh-) 1,1,1,3,3-pentafluorobutane (HFC-365mfc) - 5,000 pounds;

(-ii-) pentafluoroethane (HFC-125) - 5,000 pounds;

(-jj-) 1,1,2,2,3-pentafluoropropane (HFC-245ca) - 5,000 pounds;

(-kk-) 1,1,2,3,3-pentafluoropropane (HFC-245ea) - 5,000 pounds;

(-ll-) 1,1,1,2,3-pentafluoropropane (HFC-245eb) - 5,000 pounds;

(-mm-) 1,1,1,3,3-pentafluoropropane (HFC-245fa) - 5,000 pounds;

(-nn-) pentanes (any isomer) - 5,000 pounds;

(-oo-) propane - 5,000 pounds;

(-pp-) propylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-qq-) 1,1,2,2-terachlorodifluoroethane (CFR-112) - 5,000 pounds;

(-rr-) 1,1,1,2-tetrachlorodifluoroethane (CFC-112a) -5,000 pounds;

(-ss-) 1,1,2,2-tetrafluoroethane (HFC-134) - 5,000 pounds;

(-tt-) 1,1,1,2-tetrafluoroethane (HFC-134a) - 5,000 pounds;

(-uu-) 1,1,2-trichloro-1,2,2-trifluoroethane (CFR-113) - 5,000 pounds;

(-vv-) 1,1,1-trichloro-2,2,2-trilfloroethane (CFC-113a) - 5,000 pounds;

(-ww-) 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123) - 5,000 pounds;

(-xx-) 1,1,1-trifluoroethane (HFC-143a) - 5,000 pounds;

(-yy-) trifluoromethane (HFC-23) - 5,000 pounds; or

(-zz-) toluene - 1,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound that equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture that equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or the associated hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines as defined in this section fueled by natural gas, coal, lignite, wood, fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; or

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model, that would be reported prior to ground level concentrations reaching at any distance beyond the closest regulated entity property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission limitations.

(89) Rubbish--Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(90) Scheduled maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity that the owner or operator of the regulated entity whether performing or otherwise affected by the activity, provides prior notice and a final report as required by §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in §101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification by more than an RQ. For activities with unauthorized emissions that are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by §101.211 of this title. Expected excess opacity events as described in §101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by §101.211 of this title.

(91) Sludge--Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(92) Smoke--Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(93) Solid waste--Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under the Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land, if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended (42 United States Code, §§6901 *et seq.)*.

(94) Sour crude--A crude oil that will emit a sour gas when in equilibrium at atmospheric pressure.

(95) Sour gas--Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more than 30 grains of total sulfur per 100 cubic feet.

(96) Source--A point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple pro-

cesses emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(97) Special waste from health care-related facilities--A solid waste that if improperly treated or handled, may serve to transmit infectious disease(s) and that is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(98) Standard conditions--A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals).

(99) Standard metropolitan statistical area--An area consisting of a county or one or more contiguous counties that is officially so designated by the United States Bureau of the Budget.

(100) Submerged fill pipe--A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or, when applied to a tank that is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(101) Sulfur compounds--All inorganic or organic chemicals having an atom or atoms of sulfur in their chemical structure.

(102) Sulfuric acid mist/sulfuric acid--Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as $H_2 SO_4$ and must include sulfuric acid liquid mist, sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(103) Sweet crude oil and gas--Those crude petroleum hydrocarbons that are not "sour" as defined in this section.

(104) Total suspended particulate--Particulate matter as measured by the method described in 40 Code of Federal Regulations Part 50, Appendix B.

(105) Transfer efficiency--The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(106) True vapor pressure--The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(107) Unauthorized emissions--Emissions of any air contaminant except carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act, §382.0518(g).

(108) Unplanned maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is:

(A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or

(B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

(109) Upset event--An unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

(110) Utility boiler--A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(111) Vapor combustor--A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system that can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(112) Vapor-mounted seal--A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(113) Vent--Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(114) Visible emissions--Particulate or gaseous matter that can be detected by the human eye. The radiant energy from an open flame is not considered a visible emission under this definition.

(115) Volatile organic compound--As defined in 40 Code of Federal Regulations §51.100(s), except §51.100(s)(2) - (4), as amended on January 21, 2009 (74 FR 3441).

(116) Volatile organic compound (VOC) water separator--Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006332
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 239-6090

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CHAPTER 106. PERMITS BY RULE

SUBCHAPTER A. GENERAL REQUIREMENTS

30 TAC §106.4

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §106.4.

If adopted, the amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission proposes to amend §106.4, Requirements for Permitting by Rule, to address the applicable significant emission thresholds for particulate matter (PM), PM 10 micrometers or less (PM_{10}), and PM 2.5 micrometers or less ($PM_{2.5}$) to provide clarity to the permitting process for PM.

On July 18, 1997, the EPA revised the National Ambient Air Quality Standards (NAAQS) for PM to add new standards for $PM_{2.5}$ as an indicator. However, at that time, certain difficulties regarding implementation of the $PM_{2.5}$ regulations remained, including the lack of necessary tools to calculate emissions of $PM_{2.5}$ and related precursors, the lack of adequate modeling techniques to project ambient impacts, and the lack of $PM_{2.5}$ monitoring sites. Therefore, on October 23, 1997, EPA issued a memorandum providing for PM_{10} to be used as a surrogate for $PM_{2.5}$. EPA reaffirmed use of the surrogate policy in a memorandum dated April 5, 2005.

On November 1, 2005, the EPA proposed regulations to implement the New Source Review (NSR) program for $PM_{2.5}$. EPA published the bulk of the major NSR program final regulations for $PM_{2.5}$ on May 16, 2008 (effective on July 15, 2008). EPA noted that this final action, with EPA's proposed rule on increments, significant impact levels (SILs), and significant monitoring concentration (SMC) when final, will represent the final elements necessary to implement a $PM_{2.5}$ Prevention of Significant Deterioration (PSD) program. On February 11, 2010, the EPA proposed two actions that would end the EPA's 1997 policy allowing sources and permitting authorities to use a demonstration of compliance with the PSD requirements for PM_{10} as a surrogate for meeting the PSD requirements for $PM_{2.5}$. In the first action, the EPA proposed to repeal the "grandfathering" provision for $PM_{2.5}$ contained in the Federal PSD program, which allows applicants for proposed new major sources and major modifications that have submitted a complete PSD permit application prior to the effective date of an amendment to the PSD regulations but have not yet received final and effective PSD permit, to continue relying on information already in the application rather than immediately having to amend applications to demonstrate compliance with the new PSD requirements. In the second action, EPA also proposed to end early the PM_{10} Surrogate Policy applicable in states that have an approved PSD program in their SIP. The three-year transition period for revising the SIP and for use of the surrogate policy ends in May 2011, unless revised by EPA. In an effort to ensure the TCEQ meets regulatory requirements of the Federal Clean Air Act (FCAA), the Air Permits Division (APD) is proposing amendments to 30 TAC Chapters 101 and 106 to add specific definitions related to $PM_{2.5}$ regulation, and to address the known requirements for implementation.

Existing federal regulations require both major and minor NSR programs to address any pollutant for which there is a NAAQS and precursors to the formation of such pollutant when identified for regulation by the EPA. TCEQ rules outline the requirements for both major and minor NSR programs under 30 TAC §116.110 (addressing NSR applicability). This section requires any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state to obtain a permit under §116.111 or satisfy the conditions for another authorization type as listed within that section. Chapter 116, Subchapter B outlines the general requirements for both minor and major NSR permits. Specifically, §116.111 covers the general application requirements for both major and minor NSR. Minor NSR sources are required to comply with all sections of §116.111 except §116.111(a)(2)(h) and (i) which only apply to major NSR (Nonattainment and PSD).

For precursors, EPA provided some clarification regarding regulation of $PM_{2.5}$ precursors in the May 16, 2008, $PM_{2.5}$ implementation rule, stating that generally where scientific data and modeling analyses provide reasonable certainty that the pollutant's emissions are a significant contributor to ambient $PM_{2.5}$ concentrations, EPA believes that pollutant should be identified as a "regulated NSR pollutant" and subject to the $PM_{2.5}$ NSR provisions. Conversely, where the effect of a pollutant's emission on ambient $PM_{2.5}$ concentrations is subject to substantial uncertainty, such that in some circumstances the pollutant may not result in the formation of $PM_{2.5}$, or control of the pollutant may have no effect or may even aggravate air quality, EPA generally believes it is unreasonable to establish a nationally-applicable presumption that the pollutant is a regulated NSR pollutant subject to the requirements of NSR for $PM_{2.5}$. Therefore, EPA has established certain presumptions regarding the $PM_{2.5}$ precursors, sulfur dioxide (SO_2), nitrogen oxide (NO_x), volatile organic compound (VOC) and ammonia. Specifically, EPA presumes SO_2 and NO_x to be significant contributors to ambient $PM_{2.5}$ concentrations in all areas and thus, have termed these pollutants "presumed in," meaning requiring regulation as a precursor for $PM_{2.5}$. Conversely, the final rule does not require regulation of VOC or ammonia as a precursor to $PM_{2.5}$ for the NSR program because additional research and technical tools are necessary to characterize the emissions inventories for VOC, and there is considerable uncertainty related to ammonia as a precursor. Therefore, EPA has categorized these pollutants as "presumed out," meaning not regulated as a precursor for $PM_{2.5}$ regulation. However, states have the option to exclude NO_x, as a precursor by demonstrating that NO_x, emissions are not a significant contributor to ambient $PM_{2.5}$ concentrations in a particular area. In addition, states have the option of identifying VOC and/or ammonia as precursor(s) by demonstrating that emissions for VOC and/or ammonia are a significant contributor in an area, and thus, should be subject to major NSR.

EPA has also provided clarification regarding regulation of condensable PM under the $PM_{2.5}$ regulations stating it will not require states to address condensable PM in establishing enforceable emissions limits for either PM_{10} or $PM_{2.5}$ in NSR permits during the transitional period that ends on January 1, 2011. During this transitional period, EPA is assessing the capabilities of test methods available for measuring condensable emissions. As specified in 40 Code of Regulations (CFR) Part 51, Method 202 is used in the determination of condensable particulate emissions from stationary sources, and Method 201 is used in the determination of PM_{10} emissions. It is presumed that the appropriate test method set forth by EPA once promulgated, will be provided in 40 CFR Part 51 for measuring condensable emissions.

Finally, EPA clarified that there will be no changes to the implementation of Best Available Control Technology (BACT) requirements for $PM_{2.5}$ at major sources that are subject to the PSD program. If a new major source will emit, or have the potential to emit, a significant amount of a regulated NSR pollutant in an attainment area for that pollutant, the source must apply BACT for each emissions unit that emits the pollutant. In addition, if a physical change or operational change at an existing major source will result in a significant emissions increase and significant net emissions increase of a regulated NSR pollutant, the source must apply BACT to each proposed emissions unit experiencing a net increase in emissions of that pollutant as a re-

sult of the physical or operational change in the unit. Under the $PM_{2.5}$ PSD program, these requirements will apply to direct $PM_{2.5}$ emissions; SO_2 emissions; NO_x emissions, unless states demonstrates that NO_x is not a significant contributor to ambient $PM_{2.5}$ concentrations in that area; and to VOC if identified by a state as a precursor in the $PM_{2.5}$ attainment area where the source is located. Although EPA has specified that direct emissions of $PM_{2.5}$ at or above the significant emission rate (SER) would trigger a BACT analysis, EPA has not specified whether a precursor's emissions above the precursor's SER would trigger a BACT analysis for $PM_{2.5}$ if direct emissions of $PM_{2.5}$ are below the $PM_{2.5}$ SER. Therefore, it is presumed that BACT for direct $PM_{2.5}$ will apply only if direct $PM_{2.5}$ emissions are significant, and BACT for precursor pollutants will apply only if the precursor emissions equal or exceed the specific SER for the precursor pollutant.

SECTION DISCUSSION

§106.4, Requirements for Permitting by Rule

The commission proposes to amend §106.4, Requirements for Permitting by Rule, to address the applicable significant emission thresholds established by EPA for PM, PM_{10}, and $PM_{2.5}$. The significant emission threshold for PM is 25 tons per year (tpy), PM_{10} is 15 tpy, and $PM_{2.5}$ is 10 tpy. Section 106.4(a)(1) and (4) have been revised to include these changes. This change will provide clarity to the permitting process for particulate matter by including the significant levels for PM, PM_{10}, and $PM_{2.5}$. It will not affect existing claims and is only applicable to new or modified claims under this chapter, not currently operating authorized facilities under standard exemption or permit by rule (PBR) in accordance with §106.2, Applicability.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rulemaking amends Chapters 101 and 106 to modify definitions regarding particulate matter. This fiscal note addresses the fiscal impact of definition changes to Chapter 106, and the fiscal impact of definition changes to Chapter 101 will be addressed in a separate fiscal note.

The proposed rule incorporates federal regulatory requirements for the FCAA into state rules. EPA finalized $PM_{2.5}$ for the PSD program in 2008, and allowed states with approved SIPs to continue to implement a surrogate PM_{10} policy until May 2011, or until revised PSD programs for $PM_{2.5}$ were approved by EPA, whichever came first. During this time, the agency issued guidance to all regulated parties to aid them in complying with the federal regulations. The proposed rule amends the PBR program and formally incorporates current agency guidance regarding definitions of PM_{10} and $PM_{2.5}$ into state rules.

Local government and other state agencies that own or operate facilities that generate particulate matter will not experience any fiscal impact as a result of the proposed rule. All regulated entities have already been required to comply with federal law and implement BACT with regards to PM_{10} and $PM_{2.5}$. The incorporation of definitions will not require the implementation of additional controls until such time that EPA issues additional guidance.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with the FCAA and maintenance of the state's delegation authority.

The proposed rule is not expected to have a fiscal impact on individuals or businesses that own or operate facilities that emit particulate matter. Regulated entities have already been required to comply with federal regulations concerning particulate matter and utilize BACT. The proposed rule incorporates current agency guidance and federal regulations into state regulations, and no other implementation of control technologies is required until the EPA issues additional guidance.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses since they have already been required to implement BACT as a result of federal regulations and agency guidance. The proposed rule will not require implementation of other control technologies until EPA issues additional guidance.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with federal regulations.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rule does not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that a "major environmental rule" is, "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." While the purpose of this rulemaking is to increase protection of the environment and reduce risk to human health, it is not expected that this rulemaking will adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to im-

plement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this rulemaking; and 4) the proposed rulemaking is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), which is cited in the STATUTORY AUTHORITY section.

The specific intent of the proposed rulemaking is to amend Chapter 106 to include the significant levels for PM, PM_{10}, and $PM_{2.5}$. The preamble to this rulemaking clarifies how precursors and condensable emissions are addressed, that EPA has made no changes to the BACT analysis process for $PM_{2.5}$, and provides a basis for regulation of $PM_{2.5}$ emissions when the use of PM_{10} as a surrogate for $PM_{2.5}$ is no longer applicable.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed an analysis of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the rulemaking is to facilitate implementation of new federal regulations under the NSR program. The proposed amendment would substantially advance this stated purpose by including the significant levels for PM, PM_{10}, and $PM_{2.5}$ in Chapter 106 of TCEQ rules. The commission's analysis indicates that the Texas Government Code, Chapter 2007 does not apply to the proposed rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code §2007.003(b)(4). Specifically, EPA has promulgated new NSR regulations for $PM_{2.5}$ in accordance with 40 CFR §§52.21, 52.24, 51.160 - 51.165, 51.165(b), 51.166, and 40 Part 51, Appendix S. TCEQ, as the administrator of the NSR program for Texas, is tasked with implementing the new federal regulations in accordance with 40 CFR §51.166 and FCAA, §107(d)(1)(A)(ii) or (iii).

Nevertheless, the commission further evaluated the proposed rulemaking and performed an assessment of whether the proposed rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to facilitate implementation of new federal regulations under the NSR program. The proposed rule would substantially advance this stated purpose by including the significant levels for PM, PM_{10}, and $PM_{2.5}$ in Chapter 106.

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the rule does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendment will indirectly benefit the environment because it clearly defines the significant emission thresholds for particulate emissions and it will continue to be evaluated for compliance not to exceed significance levels which will ensure that there will be fewer adverse impacts to public health and the environment. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

There should be no effect on facilities subject to the Federal Operating Permits Program since APD is currently conducting reviews of sources subject to PSD and minor NSR that meet federal definitions and requirements. Permit holders may need to conduct an evaluation and determine if a revision to a Federal Operating Permit is needed to update the applicable requirements.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on December 13, 2010, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-020-101-PR. The comment period closes December 20, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Johnny Bowers, Air Permits Division, at (512) 239-6770.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; and §382.0514, concerning Sampling, Monitoring, and Certification.

This rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 382.0513, and 382.0514.

§106.4. Requirements for Permitting by Rule.

(a) To qualify for a permit by rule, the following general requirements must be met.

(1) Total actual emissions authorized under permit by rule from the facility shall not exceed 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO_2) or inhalable particulate matter (PM); or 15 tpy of particulate matter with diameters of 10 microns or less (PM_{10}); or 10 tpy of particulate matter with diameters of 2.5 microns or less ($PM_{2.5}$) [~~(PM_{10})~~]; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

(2) Any facility or group of facilities, which constitutes a new major stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), or any modification which constitutes a major modification, as defined in §116.12 of this title, under the new source review requirements of the Federal Clean Air Act (FCAA), Part D (Nonattainment) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and cannot qualify for a permit by rule under this chapter. Persons claiming a permit by rule under this chapter should see the requirements of §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) to ensure that any applicable netting requirements have been satisfied.

(3) Any facility or group of facilities, which constitutes a new major stationary source, as defined in 40 Code of Federal Regulations (CFR) §52.21, or any change which constitutes a major modification, as defined in 40 CFR §52.21, under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title and cannot qualify for a permit by rule under this chapter.

(4) Unless at least one facility at an account has been subject to public notification and comment as required in Chapter 116, Subchapter B or Subchapter D of this title (relating to New Source Review Permits or Permit Renewals), total actual emissions from all facilities permitted by rule at an account shall not exceed 250 tpy of CO or NO_x; or 25 tpy of VOC or SO_2 or PM [~~PM_{10}~~]; or 15 tpy of PM_{10}; or 10 tpy of $PM_{2.5}$; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.

(5) Construction or modification of a facility commenced on or after the effective date of a revision of this section or the effective date of a revision to a specific permit by rule in this chapter must meet the revised requirements to qualify for a permit by rule.

(6) A facility shall comply with all applicable provisions of the FCAA, §111 (Federal New Source Performance Standards) and §112 (Hazardous Air Pollutants), and the new source review requirements of the FCAA, Part C and Part D and regulations promulgated thereunder.

(7) There are no permits under the same commission account number that contain a condition or conditions precluding the use of a permit by rule under this chapter.

(8) The proposed facility or group of facilities shall obtain allowances for NO_x if they are subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(b) No person shall circumvent by artificial limitations the requirements of §116.110 of this title (relating to Applicability).

(c) The emissions from the facility shall comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of health and property of the public, and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(d) Facilities permitted by rule under this chapter are not exempted from any permits or registrations required by local air pollution control agencies. Any such requirements must be in accordance with TCAA, §382.113 and any other applicable law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006333

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 239-6090

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CHAPTER 117. CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS SUBCHAPTER D. COMBUSTION CONTROL AT MINOR SOURCES IN OZONE NONATTAINMENT AREAS DIVISION 2. DALLAS-FORT WORTH EIGHT-HOUR OZONE NONATTAINMENT AREA MINOR SOURCES

30 TAC §117.2110

The Texas Commission on Environmental Quality (commission) proposes an amendment to §117.2110.

If adopted, amended §117.2110 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

On April 27, 2010, Ameresco of Texas (petitioner) submitted a petition for rulemaking requesting an amendment to Chapter 117, Subchapter D, Division 2, §117.2110 for the Dallas-Fort Worth (DFW) 1997 eight-hour ozone nonattainment area. The commission approved the petition for rulemaking on June 16, 2010, and issued an order on June 22, 2010, directing the executive director to examine the issues in the petition and to initiate rulemaking. Currently, §117.2110 limits nitrogen oxides (NO_x) emissions from stationary gas-fired, lean-burn engines installed, modified, reconstructed, or relocated on or after June 1, 2007, to 0.60 grams per horsepower-hour (g/hp-hr) if fired on landfill gas and 0.50 g/hp-hr for all other lean-burn engines. The proposed change would expand the emission specification for lean-burn engines fired on landfill gas to include lean-burn engines fired on biogas at minor sources NO_x in the DFW 1997 eight-hour ozone nonattainment area.

Landfill gas and other biogas are produced from anaerobic digestion or decomposition of organic matter and have similar fuel and combustion characteristics. Both landfill gas and other biogas can contain contaminants such as sulfur, chlorine, and silicon, which are present in other gaseous fuels. Consequently, engines fired on landfill gas and other biogas can have technological feasibility issues with regard to the installation of a NO_x control catalyst because these contaminants can result in catalyst failure or deactivation in hours or days. The technological feasibility issues with regard to the installation of a NO_x control catalyst is the basis for the 0.60 g/hp-hr emission standard in the current rule and the justification for the proposed expansion of the existing emission specification to include lean-burn engines fired on biogas at minor sources of NO_x in the DFW 1997 eight-hour ozone nonattainment area.

Demonstrating Noninterference under Federal Clean Air Act, Section 110(l)

The commission provides the following information to demonstrate why the proposed change to expand the emission specification in §117.2110(a)(1)(B)(ii)(I) will not negatively impact the status of the state's attainment with the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS), will not interfere with control measures, and will not prevent reasonable further progress toward attainment of the ozone NAAQS. The commission acknowledges that the DFW area failed to attain the 1997 eight-hour ozone NAAQS by the June 15, 2010, attainment deadline based on monitoring data; however, the proposed rule change will not adversely affect the ability of the DFW area to attain the 1997 eight-hour ozone NAAQS for the reasons discussed in this preamble.

The requirement for reasonable notice and public hearing will be satisfied through a public hearing scheduled for December 14, 2010. The public comment period will begin November 19, 2010, and end December 20, 2010.

On May 23, 2007, as part of the DFW attainment demonstration, the commission adopted a new Chapter 117, Subchapter D, Division 2 with new emission control requirements for minor industrial, commercial, or institutional sources of NO_x in the DFW 1997 eight-hour ozone nonattainment area. Subchapter D, Division 2 requires owners or operators of minor sources of NO_x in the DFW 1997 eight-hour ozone nonattainment area to reduce NO_x emissions from affected stationary internal combustion engines. A minor source of NO_x in the DFW 1997 eight-hour ozone nonattainment area is any stationary source, or group of sources located within a contiguous area and under common control, that emits or has the potential to emit less than 50 tons per year of NO_x.

One source category newly regulated under Chapter 117 during the 2007 rulemaking was lean-burn engines at minor sources. The current applicable NO_x emission specification in §117.2110(a)(1)(B)(ii)(II) for gas-fired lean-burn engines using gaseous fuels other than landfill gas that are installed, modified, reconstructed, or relocated on or after June 1, 2007, is 0.50 g/hp-hr. During the 2007 rulemaking, no landfill gas-fired engines were identified in the emissions inventory in the counties impacted by the proposed rule; however, the emission specification of 0.60 g/hp-hr for gas-fired engines fired on landfill gas established by §117.2110(a)(1)(B)(ii)(I) is consistent with the emission specification for this category of engines in the Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment area.

In the 2007 Chapter 117 rulemaking for the DFW 1997 eight-hour ozone attainment demonstration, no gas-fired engines fired on biogas or other non-landfill gaseous fuels were relied upon for creditable reductions for the SIP. Therefore, if the petitioner's proposed change is adopted, allowing the slightly higher emission specification of 0.60 g/hp-hr on gas-fired engines fired on other biogas fuels would not result in a loss of any SIP creditable reductions for the DFW 1997 eight-hour ozone nonattainment area.

The proposed change is limited to a narrow category of stationary gas-fired engines with NO_x controls that were not relied upon in the DFW 1997 eight-hour ozone attainment demonstration adopted in 2007, and the resulting change in future NO_x emissions is negligible. Furthermore, if the proposed rulemaking is not adopted and the petitioner is not able to comply with the 0.50 g/hp-hr emission limit or purchase credits to offset the surplus emissions, the company may be forced to abandon the project. This outcome could actually result in a net NO_x emissions in-

crease that is more than the 0.02 tons per day (tpd) increase anticipated if the rule is adopted. If the company is forced to send the emission stream to a flare for destruction rather than use the stream as a fuel source in the engines, the total uncontrolled NO_x emission could exceed that of the controlled emissions under the proposed emission limit, as flares are exempt from NO_x emission limits under Chapter 117. Based on these factors, the commission has determined that the proposed rule change will not negatively impact the status of the state's attainment with the 1997 eight-hour ozone NAAQS, will not interfere with control measures, and will not prevent reasonable further progress toward attainment of the ozone NAAQS.

SECTION DISCUSSION

Section 117.2110, Emission Specifications for Eight-Hour Attainment Demonstration

The commission proposes to amend §117.2110(a)(1)(B)(ii)(I) by expanding the emission specification for lean-burn engines fired on landfill gas to include lean-burn engines fired on biogas at minor sources of NO_x in the DFW 1997 eight-hour ozone nonattainment area. The proposed rule revision would require owners or operators of stationary gas-fired lean-burn internal combustion engines fired on biogas fuels other than landfill gas that are installed, modified, reconstructed, or relocated on or after June 1, 2007, to comply with a NO_x emission limit of 0.60 g/hp-hr.

In addition to the proposed rule revisions, the commission proposes non-substantive formatting changes to conform with current Texas Register format requirements. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

The commission is only accepting comments regarding the specific changes proposed by the petitioner and directed by the commissioners at the June 16, 2010, agenda when the commission considered and granted the petition for rulemaking. Comments received related to other portions of the section proposed for amendment will not be considered and no changes will be made in response to such comments.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed rule is not expected to have fiscal implications for other units of state or local government.

The proposed rule would amend Chapter 117 regarding minor sources of NO_x emissions in the DFW 1997 eight-hour ozone nonattainment area. The current rule specifies that lean-burn engines fired on landfill gas at minor NO_x sources in DFW have an emission standard of 0.60 g/hp-hr. Gas-fired lean-burn engines, using gaseous fuels other than landfill gas, have a 0.50 g/hp-hr emission standard. Biogas and landfill gas are produced from the anaerobic digestion or decomposition of organic matter. The agency has received a petition from a privately owned wastewater treatment facility in the DFW area to use biogas in lean-burn internal combustion engines. The biogas is a by-product of plant operations and would be used to produce electricity and thermal energy to fuel wastewater treatment functions at the plant.

Under the current rule, gas-fired lean-burn engines using biogas are limited to the 0.50 g/hp-hr standard even though biogas has many of the characteristics and saturation of contaminants (such as sulfur, chlorine, and silicon) as landfill gas. The high contaminant content of landfill and other biogas can lead to high incidents of failure in catalyst controls and engine operations if engines using this type of fuel are not allowed to operate with an emission standard of 0.60 g/hp-hr. The proposed rule will allow lean-burn engines at minor NO_x sources in the DFW 1997 eight-hour ozone nonattainment area to operate at 0.60 g/hp-hr if they use biogas. Making the emission standards for these engines equal to standards for landfill gas engines will allow the company to use biogas that would otherwise be considered to be a source of volatile organic compounds or NO_x emissions to produce power for its own plant operations or for sale to the power grid.

The expansion of the 0.60 g/hp-hr emission standard is not expected to impact the SIP for the DFW 1997 eight-hour ozone nonattainment area since no engines fired on biogas or other non-landfill gaseous fuels were relied upon to provide SIP emission reductions.

The proposed rule is not expected to have fiscal impacts on any facilities owned or operated by state agencies and local government in the DFW 1997 eight-hour ozone nonattainment area since no government owned facilities that are classified as minor sources of NO_x are known to operate lean-burn engines using landfill gas or other biogas.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the change seen in the proposed rule will be increased flexibility to use renewable fuels to produce electricity and thermal energy without affecting the capability to reduce NO_x emissions in the DFW 1997 eight-hour ozone nonattainment area.

The proposed rule is not expected to affect individuals.

The proposed rule is expected to allow biogas fueled lean-burn engines to operate with the same emission standard of 0.60 g/hp-hr as a landfill gas fueled lean-burn engine. The proposed rule will allow a wastewater treatment plant to use waste generated by its own operations and eliminate the need to purchase additional emission credits equivalent to 0.02 tpd or add controls, which would be expensive and increase downtime at the treatment facility. The wastewater treatment facility will operate three biogas-fired lean-burn engines. Emission credits can range from $800 to $25,000 per ton. Cost savings could range from $3,360 to $105,000 per year if the business is not required to operate these engines at the current 0.50 g/hp-hr.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. There are no known small businesses that are minor sources in the DFW 1997 eight-hour ozone nonattainment area that are expected to use lean-burn engines fueled by landfill gas or other biogas.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rule does not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that a "major environmental rule" is, "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule which, "(1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopts a rule solely under the general powers of the agency instead of under a specific state law."

The proposed rulemaking implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, a SIP must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIP provides for implementation, attainment, maintenance, and enforcement of the NAAQS within the state.

The specific intent of the proposed rulemaking is to provide fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area. The current applicable NO_x emission specification in §117.2110(a)(1)(B)(ii)(II) for gas-fired lean-burn engines using gaseous fuels other than landfill gas that are installed, modified, reconstructed, or relocated on or after June 1, 2007, is 0.50 g/hp-hr. The current applicable NO_x emission specification in §117.2110(a)(1)(B)(ii)(I) for gas-fired engines fired on landfill gas is 0.60 g/hp-hr. Landfill gas and other biogas are produced from anaerobic digestion or decomposition of organic matter and have similar fuel and combustion characteristics. Both landfill gas and other biogas can contain contaminants such as sulfur, chlorine, and silicon. Consequently, engines fired on landfill gas and other biogas can have technological feasibility issues with regard to the installation of a NO_x control catalyst because these contaminants can result in catalyst failure or deactivation in hours or days. The technological feasibility issues with regard to the installation of a NO_x control catalyst is the basis for the 0.60 g/hp-hr emission standard in the current §117.2110(a)(1)(B)(ii)(I) and the justification for the proposed expansion of the existing emission specification to include lean-burn engines fired on biogas at minor sources NO_x in the DFW 1997 eight-hour ozone nonattainment area. To further the specific intent of providing fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area, the proposed rule will expand the current §117.2110(a)(1)(B)(ii)(I) to include biogas other than landfill gas.

The proposed rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because: 1) the specific intent of the proposed rule is not to protect the environment or reduce risks to human health from environmental exposure, but rather to provide fair and consistent application of SIP rules in the DFW eight-hour ozone nonattainment area by providing a specific expansion of §117.2110(a)(1)(B)(ii)(I) to apply to biogas other than landfill gas; and 2) as discussed in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE, FISCAL NOTE, PUBLIC BENEFITS AND COSTS, SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS, and the LOCAL EMPLOYMENT IMPACT STATEMENT sections of this preamble, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor will the proposed rule adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Because the proposed rulemaking is not a major environmental rule, it is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225.

While the proposed rulemaking does not constitute a major environmental rule, even if it did it would not be subject to a regulatory impact assessment under Texas Government Code, §2001.0225. The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not

large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full Regulatory Impact Analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that, "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

Regardless of whether the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this rule is part of the commission's SIP for making progress toward the attainment and maintenance of the eight-hour ozone NAAQS in the DFW nonattainment area. Therefore, the proposed rule does not exceed a standard set by federal law or exceed an express requirement of state law, since the rule is part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law - the NAAQS. The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Envtl. Quality,* 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). In addition, no contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the agency but is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, and 382.017.

This rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), for the following reasons. The proposed rulemaking is not a major environmental law because: 1) the specific intent of the proposed rule is not to protect the environment or reduce risks to human health from environmental exposure, but rather to provide fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area; and 2) the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor will it adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Furthermore, even if the proposed rulemaking was a major environmental rule, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the DFW SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) no contract or delegation agreement covers the topic that is the subject of this rulemaking; and 3) the proposed rulemaking is authorized by specific sections of THSC, Chapter 382, and the TWC, which are cited in the STATUTORY AUTHORITY section of this preamble.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an analysis of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply because this rulemaking provides for fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area by expanding the current §117.2110(a)(1)(B)(ii)(I) NO_x emission specification to include biogas other than landfill gas.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Ar-

ticle I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

The specific purpose of the proposed rulemaking is to provide fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area. The current applicable NO_x emission specification in §117.2110(a)(1)(B)(ii)(II) for gas-fired lean-burn engines using gaseous fuels other than landfill gas that are installed, modified, reconstructed, or relocated on or after June 1, 2007, is 0.50 g/hp-hr. The current applicable NO_x emission specification in §117.2110(a)(1)(B)(ii)(I) for gas-fired engines fired on landfill gas is 0.60 g/hp-hr. Landfill gas and other biogas are produced from anaerobic digestion or decomposition of organic matter and have similar fuel and combustion characteristics. Both landfill gas and other biogas can contain contaminants such as sulfur, chlorine, and silicon. Consequently, engines fired on landfill gas and other biogas can have technological feasibility issues with regard to the installation of a NO_x control catalyst because these contaminants can result in catalyst failure or deactivation in hours or days. The technological feasibility issues with regard to the installation of a NO_x control catalyst is the basis for the 0.60 g/hp-hr emission standard in the current §117.2110(a)(1)(B)(ii)(I) and the justification for the proposed expansion of the existing emission specification to include lean-burn engines fired on biogas at minor sources NO_x in the DFW 1997 eight-hour ozone nonattainment area. To further the specific intent of providing fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area, the proposed rule will broaden the current §117.2110(a)(1)(B)(ii)(I) to biogas other than landfill gas.

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Because the proposed rule promulgates an exemption, the rule is less burdensome, restrictive, or limiting of rights to private real property than the existing rule. Furthermore, the proposed rule will benefit the public by providing fair and consistent application of SIP rules in the DFW 1997 eight-hour ozone nonattainment area. The proposed rule does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rule simply expands the existing exemption in §117.403 to include sources that have technological feasibility issues similar to those of the sources covered by the current exemption. Therefore, the rule will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking will not affect any coastal natural resource areas because the rule only affects counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 117 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed amendment to Chapter 117 is adopted, owners or operators subject to the federal operating permits program that elect to comply with the amended emission specification must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 117 requirements.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Fort Worth on December 14, 2010, at 2:00 p.m. at the Texas Commission on Environmental Quality, Region 4 Office, DFW Public Meeting Room, 2309 Gravel Road. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Natalia Henricksen, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-048-117-EN. The comment period closes December 20, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Ray Schubert, Air Quality Division, at (512) 239-6615.

STATUTORY AUTHORITY

The amendment is proposed under the authority of the following: Texas Government Code, §2001.021, Petition for the Adoption of Rules, which authorizes an interested person to petition a state agency for the adoption of a rule; Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, and §5.105, General Policy (these provisions authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC); Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the

TCAA; THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, TCAA, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The amendment is also proposed under THSC, §382.016, Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; THSC, §382.021, Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures; and THSC, §382.051, Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, et seq., which requires states to submit SIP revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements TWC, §5.103 and §5.105 and THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.051, and FCAA, 42 USC, §§7401 et seq.

§117.2110. Emission Specifications for Eight-Hour Attainment Demonstration.

(a) The owner or operator of any source subject to this division (relating to Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Minor Sources) shall not allow the discharge into the atmosphere emissions of nitrogen oxides (NO_x) in excess of the following emission specifications.

(1) Emission specifications for stationary, gas-fired, reciprocating internal combustion engines are as follows:

(A) rich-burn engines:

(i) fired on landfill gas, 0.60 grams per horsepower-hour (g/hp-hr); and

(ii) all other rich-burn engines, 0.50 g/hp-hr; and

(B) lean-burn engines:

(i) placed into service before June 1, 2007, that have not been modified, reconstructed, or relocated on or after June 1, 2007, 0.70 g/hp-hr; and

(ii) placed into service, modified, reconstructed, or relocated on or after June 1, 2007:

(I) fired on landfill gas or other biogas, 0.60 g/hp-hr; and

(II) all other lean-burn engines, 0.50 g/hp-hr.

(2) The emission specification for stationary, dual-fuel, reciprocating internal combustion engines is 5.83 g/hp-hr.

(3) Emission specifications for stationary, diesel, reciprocating internal combustion engines are as follows:

(A) placed into service before March 1, 2009, that have not been modified, reconstructed, or relocated on or after March 1, 2009, the lower of 11.0 g/hp-hr or the emission rate established by testing, monitoring, manufacturer's guarantee, or manufacturer's other data; and

(B) for engines not subject to subparagraph (A) of this paragraph:

(i) with a horsepower (hp) rating of 50 hp or greater, but less than 100 hp, that are installed, modified, reconstructed, or relocated on or after March 1, 2009, 3.3 g/hp-hr;

(ii) with a horsepower rating of 100 hp or greater, but less than or equal to 750 hp, that are installed, modified, reconstructed, or relocated on or after March 1, 2009, 2.8 g/hp-hr; and

(iii) with a horsepower rating of 750 hp or greater that are installed, modified, reconstructed, or relocated on or after March 1, 2009, 4.5 g/hp-hr.

(4) As an alternative to the emission specifications in paragraphs (1) - (3) of this subsection for units with an annual capacity factor of 0.0383 or less, 0.060 pound per million British thermal units (lb/MMBtu) [~~lb/MMBtu~~] heat input. For units placed into service on or before December 31, 2000, the annual capacity factor as of December 31, 2000, must be used to determine eligibility for the alternative emission specification of this paragraph. For units placed into service after December 31, 2000, a 12-month rolling average must be used to determine the annual capacity factor.

(5) For the purposes of this subsection, the terms "modification" and "reconstruction" have the meanings defined in §116.10 of this title (relating to General Definitions) and 40 Code of Federal Regulations §60.15 (December 16, 1975), respectively, and the term "relocated" means to newly install at an account, as defined in §101.1 of this title (relating to Definitions), a used engine from anywhere outside that account.

(b) The averaging time for the NO_x emission specifications of subsection (a) of this section is as follows:

(1) if the unit is operated with a NO_x continuous emissions monitoring system (CEMS) or predictive emissions monitoring system (PEMS) under §117.2135(c) of this title (relating to Monitoring, Notification, and Testing Requirements), either as:

(A) a rolling 30-day average period, in the units of the applicable standard;

(B) a block one-hour average, in the units of the applicable standard, or alternatively;

(C) a block one-hour average, in pounds per hour, for boilers, calculated as the product of the boiler's maximum rated capacity and its applicable limit in lb/MMBtu; or

(2) if the unit is not operated with a NO_x CEMS or PEMS under §117.2135(c) of this title, a block one-hour average, in the units of the applicable standard.

(c) The maximum rated capacity used to determine the applicability of the emission specifications in subsection (a) of this section must be the greater of the following:

(1) the maximum rated capacity as of December 31, 2000; or

(2) the maximum rated capacity after December 31, 2000.

(d) A unit's classification is determined by the most specific classification applicable to the unit as of December 31, 2000. For example, a unit that is classified as a stationary gas-fired engine as of December 31, 2000, but subsequently is authorized to operate as a

dual-fuel engine, must be classified as a stationary gas-fired engine for the purposes of this chapter.

(e) Changes after December 31, 2000, to a unit subject to an emission specification in subsection (a) of this section (ESAD unit) that result in increased NO_x emissions from a unit not subject to an emission specification in subsection (a) of this section (non-ESAD unit), such as redirecting one or more fuel or waste streams containing chemical-bound nitrogen to an incinerator or a flare, is only allowed if:

(1) the increase in NO_x emissions at the non-ESAD unit is determined using a CEMS or PEMS that meets the requirements of §117.2135(c) of this title, or through stack testing that meets the requirements of §117.2135(f) of this title; and

(2) emission credits equal to the increase in NO_x emissions at the non-ESAD unit are obtained and used in accordance with §117.9800 of this title (relating to Use of Emission Credits for Compliance).

(f) A source that met the definition of major source on December 31, 2000, is always classified as a major source for purposes of this chapter. A source that did not meet the definition of major source (i.e., was a minor source, or did not yet exist) on December 31, 2000, but becomes a major source at any time after December 31, 2000, is from that time forward always classified as a major source for purposes of this chapter.

(g) The availability under subsection (a)(4) of this section of an emission specification for units with an annual capacity factor of 0.0383 or less is based on the unit's status on December 31, 2000. Reduced operation after December 31, 2000, cannot be used to qualify for a more lenient emission specification under subsection (a)(4) of this section than would otherwise apply to the unit.

(h) No person shall allow the discharge into the atmosphere from any unit subject to NO_x emission specifications in subsection (a) of this section, emissions in excess of the following, except as provided in §117.2125 of this title (relating to Alternative Case Specific Specifications):

(1) carbon monoxide (CO), 400 ppmv at 3.0% oxygen (O_2) [~~O_2~~], dry basis (or alternatively, 3.0 g/hp-hr for stationary internal combustion engines):

(A) on a rolling 24-hour averaging period, for units equipped with CEMS or PEMS for CO; and

(B) on a one-hour average, for units not equipped with CEMS or PEMS for CO; and

(2) for units that inject urea or ammonia into the exhaust stream for NO_x control, ammonia emissions of 10 ppmv at 15% O_2, dry, for gas-fired lean-burn engines; and 3.0% O_2, dry, for all other units, based on:

(A) a block one-hour averaging period for units not equipped with a CEMS or PEMS for ammonia; or

(B) a rolling 24-hour averaging period for units equipped with CEMS or PEMS for ammonia.

(i) An owner or operator may use emission reduction credits as specified in §117.9800 of this title to comply with the NO_x emission specifications of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006377
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 239-0177

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CHAPTER 298. ENVIRONMENTAL FLOW STANDARDS FOR SURFACE WATER

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §§298.1, 298.5, 298.10, 298.15, 298.20, 298.25, 298.200, 298.205, 298.210, 298.215, 298.220, 298.225, 298.230, 298.240, 298.250, 298.255, 298.260, 298.265, 298.270, 298.275, 298.280, 298.285, and 298.290.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

In 2007, the 80th Legislature, passed House Bill 3 (HB 3), relating to the management of the water resources of the state, including the protection of instream flows and freshwater inflows; and, Senate Bill 3 (SB 3), relating to the development, management, and preservation of the water resources of the state. Both of these bills amended Texas Water Code (TWC), §11.1471, which requires the commission to adopt rules related to environmental flow standards and set-asides. The commission is proposing to create a new Chapter 298, Environmental Flow Standards for Surface Water, to implement the environmental flow provisions of HB 3, Article 1, and SB 3, Article 1, and propose environmental flow standards for the Trinity and San Jacinto Rivers, their associated tributaries, and Galveston Bay; and the Sabine and Neches Rivers, their associated tributaries, and Sabine Lake Bay.

Prior to HB 3/SB 3, the commission had authority to protect environmental interests as it permitted state surface water. The commission had authority to maintain: existing instream uses under TWC, §11.147(d); water quality under TWC, §11.147(d) and §11.150; fish and wildlife habitat under TWC, §11.147(e) and §11.152; and freshwater inflows to bay and estuary systems under TWC, §11.147(a) - (c). TWC, §11.147(b) - (e) and §11.152 required that these environmental considerations be included only to the extent practicable or reasonable and required that environmental considerations be considered along with other factors of public welfare. HB 3/SB 3 did not make major changes to this commission authority.

The commission also retains its ability, granted prior to HB 3/SB 3, to place special conditions in water right permits to protect environmental interests. Before HB 3/SB 3, TWC, §11.134(b)(3)(D), required consideration of environmental interests for new appropriations of water, including amendments that granted an increase in the amount of water that could be diverted and TWC, §11.085, required consideration for interbasin transfers. Permits for water projects that call for the re-diversion of wastewater or return flows to a watercourse, so called "indirect reuse" projects, were also subject to special conditions to protect environmental uses under TWC, §11.042 and §11.046. Amendments that were not new appropriations were required to be authorized if, among other criteria, the

amendment would not cause adverse impact to the environment of greater magnitude than under the original permit under TWC, §11.122(b). As a practical matter, if any adverse impact to the environment was noted in an application for an amendment, then special conditions were crafted to remove the adverse impact so that the amendment might be granted.

HB 3/SB 3 changed the process by which the state would decide the flow that needed to be preserved in the watercourse for the environment and the balancing of environmental interests along with other public interests. HB 3/SB 3 created a statewide Environmental Flows Advisory Group (Advisory Group). The Advisory Group was given the responsibility to appoint Basin and Bay Area Stakeholder Committees (the stakeholder committee) for each of the state's river basin, bay, and estuary systems. The stakeholder committees, in turn, appointed a Basin and Bay Expert Science Team (the science team). The science teams were to develop a recommended environmental flow regime, or schedule of flow quantities adequate to support a sound ecological environment. The stakeholders were to take the science team's recommendations and consider those recommendations in conjunction with other factors, including the present and future needs for water for other uses. The stakeholders were also to report their recommendations to the commission. Both the science teams and the stakeholder committees were to reach their recommendations by a consensus basis to the maximum extent possible. The commission, in turn, was to take the recommendations from the science team, the stakeholder committees, the Advisory Group, and a statewide Science Advisory Committee, and consider that information along with other information and by rule adopt environmental flow standards for each basin and bay system. At the same time the commission is to establish an amount of unappropriated water, if available, to be set aside to satisfy the environmental flow standards to the maximum extent reasonable when considering human water needs. Once the environmental flow standards are adopted, the commission's objective or goal will be to protect the standards, along with the interests of senior water right holders, in its water rights permitting process for new appropriations and amendments that increase the amount of water to be taken, stored, or diverted. Under HB 3/SB 3, the commission may use the set-aside or use its existing authority to place special conditions in permits to protect the environmental flow standards.

The commission received the Trinity and San Jacinto Rivers and Galveston Bay science team's report on December 1, 2009, and the stakeholder committee report on May 28, 2010. The commission received the Sabine and Neches Rivers and Sabine Lake Bay science team's report on November 30, 2009, and the stakeholder committee report on May 24, 2010. Copies of the Trinity and San Jacinto Rivers and Galveston Bay reports are available on the website: *http://www.tceq.state.tx.us/goto/eflows/galvestonbay.*

Copies of the Sabine and Neches Rivers and Sabine Lake Bay reports are available on the website: *http://www.tceq.state.tx.us/goto/eflows/sabinelake.*

The commission proposes rules in Subchapter A to implement HB 3/SB 3 for the whole state. As the commission receives stakeholder recommendations, it intends to adopt environmental flow standards and basin-specific rules in separate subchapters. The commission proposes Subchapter B to cover the Trinity and San Jacinto Rivers and Galveston Bay. The commission proposes Subchapter C to cover the Sabine and Neches Rivers and Sabine Lake Bay.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also proposes to amend 30 TAC Chapter 35, Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions.

SECTION BY SECTION DISCUSSION

Subchapter A: General Provisions

§298.1, Definitions

The commission proposes new §298.1 to define common terms used in Chapter 298. Occasionally, the same term might be defined differently for a specific basin or bay and basin system. In those cases, the term will be redefined for the subchapter devoted to that specific bay and basin system. Terms defined in Subchapter B and Subchapter C are applicable to the specific bay and basin systems referred to in those chapters, and those terms will control over the definitions in Subchapter A.

In §298.1(1), (7), and (8) the commission proposes definitions for the terms "base flow," "pulse or high flow pulse," and "subsistence flow" which represent components of a flow regime. The Science Advisory Committee used these instream flow regime components in their recommended framework for the development of environmental flow regime recommendations. The commission notes that both the science teams used these components in developing portions of their reports. The commission anticipates that future recommendations will use similar components; however, the commission, by including definitions for these components, does not mean to imply that all future recommendations must use these exact components as defined here.

In §298.1(2) the commission proposes a definition for the term "environmental flow regime." The commission proposes to define the term "environmental flow regime" by tracking the definition in TWC, §11.002(16), without all of the qualifying clauses. The commission intends its definition to have the same meaning as the statutory meaning.

In §298.1(3) the commission proposes a definition for the term "environmental flow standards." The commission proposed to define the term "environmental flow standards" by tracking the definition in TWC, §11.002(17). The commission intends its definition to have the same meaning as the statutory meaning.

In §298.1(4) and (6) the commission proposes a definition for the terms "Lower Rio Grande" and "Middle Rio Grande." The commission proposes to define the terms "Lower Rio Grande" and "Middle Rio Grande" by tracking the definitions in 30 TAC §303.2, except that the definitions in this chapter refer only to the mainstem of the Rio Grande.

In §298.1(5) the commission proposes a definition for the term "measurement point." TWC, §11.1471(c) requires that environmental flow standards may vary geographically by specific location in a river basin or bay system. The commission proposes the use of the term "measurement point" to describe those locations where environmental flow standards are established.

In §298.1(9) the commission proposes a definition for the acronym "USGS."

In §298.1(10) the commission proposes a definition for the term "water right holder." The commission proposes to define the term "water right holder" with its common practical meaning, being the owner of a water right permit, which also is defined in this chapter.

In §298.1(11) the commission proposes a definition for the term "water right permit." The commission proposes a definition of "water right permit" that includes permits, certificates of adjudication, and certified filings for the area of the state where the water rights adjudication process is not final, generally the Pecos Subbasin, as well as permits issued since the adjudication process.

§298.5, General

The commission proposes new §298.5 to provide that this chapter contains the commission's rules related to environmental flow standards. The commission is proposing the environmental flow standards in Subchapter B for the Trinity and San Jacinto Rivers, their tributaries and Galveston Bay and in Subchapter C for the Sabine, and Neches Rivers, their associated tributaries, and Sabine Lake Bay. The commission has carefully considered: the definitions of the geographical extent of the river basin and bay system adopted by the Advisory Group and the designation of river basins by the Texas Water Development Board; the schedule for the adoption of environmental flows standards established by the Advisory Group; the recommendations developed by the stakeholder committees for their respective areas and any strategies identified by the stakeholders to meet the flow standards; comments submitted by the Advisory Group; the specific characteristics of the river basin and bay system; economic factors considered appropriate by the commission; human and other competing water needs in the river basin; and all reasonably available scientific information, including scientific information provided by the Science Advisory Committee; and, other appropriate information. The commission specifically invites commenters to provide any relevant information, which may differ from these proposed standards, that in the commenter's opinion would assist the commission in deciding on final environmental flow standards. The proposed new section would implement TWC, §11.1471(a) - (c).

§298.10, Applicability

The commission proposes new §298.10. The intent of HB 3/SB 3 was that the environmental flow standards would only apply to new appropriations of water and amendments that granted a new appropriation of water after September 1, 2007. Subsection (a) of this proposed section states the intent of those bills. However, HB 3/SB 3 left open the question of what process and substantive amounts of water will be used in special conditions, if any, to protect environmental flows for interbasin transfers of existing appropriations; amendments, such as moving a diversion point upstream that does not appropriate new water; and indirect reuse permits under either TWC, §11.042 or §11.046, that might or might not be considered a new appropriation. Under subsection (b) of the proposed rule, the commission intends to clarify that in those cases where this chapter does not apply, the commission will use its existing authority granted under TWC, Chapter 11, as may be modified by its 30 TAC Chapter 295 and Chapter 297 rules. This proposed new section would implement SB 3 and HB 3, as §1.27 was not codified into the TWC.

§298.15, Special Conditions to Protect Environmental Flow Standards and Set-Asides

The commission proposes a new §298.15 to incorporate special conditions to protect the environment and set-asides into the rule. One of the ways that the commission may take action to attempt to satisfy environmental flow standards is to set aside unappropriated water under TWC, §11.1471(a)(2). Once the commission has set aside unappropriated water for this purpose, under TWC, §11.023(a) and §11.1471(d), the water is not available for appropriation, except in an emergency under TWC, §5.506 and §11.148. In addition, once the commission has established a set-aside, it is also obligated under TWC, §11.1471(d) to include, in new appropriations, appropriate conditions to ensure protection of the environmental flow set-aside.

The commission understands that special conditions may also be imposed to protect environmental flows in other situations besides when the commission has set aside unappropriated flows. The commission views set-asides as a tool, in circumstances specified by the statute, for a high-level of protection, but not the only level of protection afforded by the water code for environmental flows. Just as it has before HB 3/SB 3, the commission may impose special conditions in water right permits to protect environmental interests. Under the typical special conditions imposed by the commission prior to HB 3/SB 3, a broad classification of waters was allowed to satisfy the special condition. Water appropriated to downstream water rights holders, water of another state under an interstate compact, water appropriated to another but not used, and return flows would all count towards satisfying any environmental flow special condition. The commission considers this type of special condition still available to the commission to provide protection to environmental flow standards adopted pursuant to HB 3/SB 3. The commission is not proposing to specify the exact terms and conditions of special conditions that it will impose to protect environmental flow standards. The commission sees implementation of HB 3/SB 3 as an evolutionary process. The commission wishes to maintain flexibility in permit special conditions as it gains experience implementing the environmental flow standards. This proposed new section would implement TWC, §§11.023, 11.1471(d), and 11.147(e-3).

§298.20, Priority Date for Set-Asides

The commission proposes new §298.20. This section establishes that an environmental flow standard or set-aside that meets certain criteria will be assigned a priority date that corresponds to the date the commission receives the environmental flow recommendation. Further, this proposed new section establishes that the priority date will be included in certain water availability models (WAMs). In accordance with TWC, §11.1471(e), for any environmental flow set-aside, that set aside water must be included in the commission's WAM with a priority date based on the date that the commission received the recommendations from the applicable science team. The commission also reserves the right to protect environmental flow standards by placing those standards into its availability models. When the commission places those environmental flow standards into the models it will give the flow standards the same priority date that it would give a set-aside. This is in part to ensure that the standards will not affect existing water rights. This proposed new section would implement TWC, §11.1471(e).

§298.25, Process for Adjusting Environmental Flow Conditions in Certain Permits

The commission proposes new §289.25. Under the HB 3/SB 3 amendment to TWC, §11.147, for all new appropriations of water after September 1, 2007, the commission was required to include in the water right a provision that allows the commission to adjust environmental flow conditions, if the commission later determines that the adjustment is appropriate to achieve compliance with adopted environmental flow standards. This section proposes procedures for that adjustment.

Subsection (a) proposes that the adjustment process would start on the petition by the executive director. The adjustment would only apply to new appropriations and amendments that increased the appropriation issued after September 1, 2007, the effective date of HB 3/SB 3, Article 1. Subsection (b) proposes that the executive director's petition be similar to an original application for a water permit, but the title should indicate that it is for an adjustment to an environmental flow special condition. Subsection (c) proposes that the notice for these petitions for adjustment of special conditions be by first class mail to all water right holders and navigation districts in the basin. The rule also proposes that notice be posted to the agency's Web site. Notice is proposed to be given at least 30 days prior to action on the petition. Subsection (d) proposes that the commission may act on the petition without holding a public hearing. The authority for this subsection comes from TWC, §11.147(e-1), which does not mention a public hearing for the decision to adjust these special conditions. The statute does specify that adjustments may be made after an "expedited public comment process." Subsections (e) and (f) propose to provide that motions for reconsideration of the commission's action may be filed within 30 days by any of the following: the commission, the executive director, the water right holder, or the affected parties. The proposal would require the motion for reconsideration to be in writing. Subsection (g) proposes to give the commission, after it grants a motion to reconsider, authority to refer the matter to the State Office of Administrative Hearings. Subsection (h) proposes to implement the provision of the statute that the adjustment may not exceed 12.5% of the annualized total of the amount required to be adjusted. The 12.5% calculation for environmental flow conditions expressed in cubic feet per second is proposed to be calculated by a simple arithmetic calculation of a 12.5% increase to the flow condition. For environmental flow conditions for high flow pulses that may have a peak flow component expressed in cubic feet per second, a duration expressed in hours or days, and a total volume expressed in acre-feet, the proposal is to use a 12.5% increase of the total volume of the condition annualized by totaling all the required pulses per year. Subsection (i) discusses the basis of environmental flow adjustment and is proposed to track the language of TWC, §11.147(e-1)(2), and is not intended to expand or restrict the intent of this section.

Subsection (j) is proposed to implement the provision of the statute that calls for the adjustment to be based on appropriate consideration of the voluntary contributions to the Texas Water Trust, voluntary amendments to existing water rights to change the use or add a use for instream flows dedicated to environmental needs or bay and estuary inflows, and the appropriate credit for those contribution or amendments. Water rights vary in reliability or the amount of time that water is actually present in the watercourse. The proposed rule recognizes that a contribution of reliable water or amendment for instream uses and bay and estuary freshwater inflows should be entitled to higher consideration and credit than a similar contribution or amendment of less reliable water. In order to avoid an overly complicated rule, the commission proposes that more reliable water, proposed to be defined as water where the total volume is available at least 75% of the years, is entitled to full credit. The amount of water must be evenly distributed over the full year. For example, the water right holder seeking credit or consideration under the proposed rule would not be able to specify that their 10,000 acre-foot donation should be considered as being made only in June, July, and August, unless the original water right only allowed diversions in those months. The commission proposes that water that is available less than 75% of the years, is entitled to credit for 50% of the amount of water, again spread over the full year. For water rights amended to add a use for instream flows dedicated to environmental needs or bay and estuary inflows, the water right holder retains the ability to use the water right for its original purposes. The rule proposes to give the water right holder credit for 50% of the amount so amended, so long as that amount is not used for its original purposes. This proposed new section would implement TWC, §11.147(e-1) and (e-2).

Subchapter B: Trinity, San Jacinto Rivers, and Galveston Bay.

The commission proposes Subchapter B to contain all of the environmental flow standards and rules specific to the basin and bay system composed of the Trinity and San Jacinto Rivers, their associated tributaries, and Galveston Bay. The science team delivered its report to the commission on December 1, 2009. The stakeholder committee for this basin and bay system delivered its recommendations to the commission on May 28, 2010. The commission understands that it is now its duty to adopt environmental flow standards under TWC, §11.02362(c)(5). This proposed new subchapter would implement the schedule established by the Advisory Group under TWC, §11.02362, and environmental flow standards required of the commission in TWC, §11.1471.

§298.200, Applicability and Purpose

The commission proposes new §298.200 to describe the purpose of Subchapter B and in what circumstances it applies.

§298.205, Definitions

The commission proposes new §298.205. The proposed section has definitions of terms that will apply only to this subchapter. In §298.205(1), (2), (4), and (5) the commission proposes definitions for the seasons, "fall," "spring," "summer," and "winter" because the proposed environmental flow standards for this basin and bay system vary by season. The definitions are the same as the definitions of the seasons in the recommendations of the majority of the stakeholders and that portion of the science team that identified themselves as the "conditional group." In §298.205(3) the commission proposes a definition for "sound ecological environment." This proposed definition is the same definition as presented by the majority of the stakeholders.

§298.210, Findings

The commission proposes new §298.210 regarding findings related to sound ecological environments. The proposed finding regarding the ecological environment is in keeping with the stakeholder committee reports. Additional information on the commission's reasoning for the proposed schedule of flow quantities and environmental flow standards can be found in this preamble under the analyses for §298.220 and §298.225. This proposed new section would implement TWC, §11.1471.

§298.215, Standards Priority Date

The commission proposes new §298.215 which establishes the priority date for any set-asides and any modeling of the environmental flow standards as the date the commission received the report from the science team for the system, which was December 1, 2009.

§298.220, Schedule of Flow Quantities

The commission proposes new §298.220 regarding the schedule of flow quantities. The commission proposes this section to

explain the implementation of the environmental flow standards for the following section. The commission reserves the right to not use the exact wording of the section in water right permits issued after the adoption of these rules. However, this section does express how the commission intends to implement the proposed environmental flow standards in water right permit applications for new appropriations. Subsistence flows are intended to be the minimum flows below which the commission will not allow diversions or storage of water. Therefore, the water right holder may not divert or store water if the flow at the applicable measurement point is below the subsistence flow standard. If the flow is above the subsistence flow standard but below the base flow standard then the water right holder may divert or store water down to the subsistence flow standard. Once the flow at the applicable measurement point is above the base flow standard for the season, then the water right holder may store or divert water according to its permit as long as the flow at the measurement point does not fall below the applicable base flow standard. The commission proposes that two pulse flows per season be allowed to pass if the flows are above the base flow standard for the season and if the peak flow trigger level is reached at the measurement point. Once the trigger conditions are met, the water right holder may not store or divert water until either the applicable pulse volume passes the measurement point or the applicable pulse duration has occurred. The commission does not propose that the water right holder be required to produce a pulse flow. Pulses occur because of high rainfall events. The commission does propose that during two of these high rainfall events per season, the high flow pulse be allowed to pass downstream. If in a particular season, only one of the high flow pulses identified in the commission's proposed rule is generated, then there would be no need to "catch up" or allow more than two high flow pulses to pass in the following season. The commission specifically requests comments on alternative ways to implement the environmental flow standards of §298.225.

§298.225, Environmental Flow Standards

The commission proposes new §298.225 to provide the environmental flow standards of TWC, §11.1471, for the basin and bay system composed of the Trinity and San Jacinto Rivers, associated tributaries, and the Galveston Bay system. The commission based its decision on consideration of sound science and other public interests and relevant factors. In the absence of a consensus recommendation from the stakeholders, which balanced science with other public interests, the commission proposes standards based on available information and recommendations from the stakeholders, and recommendations from the science teams. The measurement points are those recommended by the majority of the stakeholders and that portion of the science team identified as the conditional group. In addition, to ensure that the proposed standards take into account the geographic extent of the river basin and bay system, two additional locations are proposed. These additional locations were recommended as locations for adaptive management by the conditional group of the science team and were also recommended by the portion of the science team identifying themselves as the "regime group," as well as the remaining stakeholders. The proposed base and subsistence standards are those recommended by the conditional group of the science team, and the majority of the stakeholders. For the additional two locations, the base and subsistence standards are those recommended for adaptive management purposes by the conditional group of the science team. The proposed high flow pulse standards are based on adaptive management pulses recommended by the conditional group of the science team and are also recommended as low tier pulses by the regime group of the science team. The proposed bay and estuary freshwater inflow standards for Galveston Bay are based on the recommendations of the majority of the stakeholders.

The executive director performed an analysis to address the issue of balancing human and other competing needs for water in the basin and bay system. The executive director did not look at every possible future water use scenario, but limited the selection of scenarios to those that could reasonably be expected to be implemented before the environmental flow standards are reconsidered, in accordance with the schedule in §298.240. The executive director did not look at longer term water use scenarios, i.e. 50 years in the future, because there will be another opportunity to look at those long term scenarios through HB 3/SB 3's adaptive management provisions. Under those provisions, the standards will be re-examined based on improved science and the stakeholders will have another opportunity to re-evaluate the issue of balancing human and other competing needs for water in the basin and bay system.

The executive director reviewed the Regional Water Plans for Regions C and H, as those regions are delineated by the Texas Water Development Board for the Regional Water Planning process. Based on this review, the executive director selected one future use scenario for the balancing analysis from the Trinity River Basin and one from the San Jacinto River Basin. For all evaluations, the executive director used the commission's WAM for the specific river basin and modified it by adding the selected scenario. Each scenario is different, therefore the application of criteria and reporting of results varies based on the specifics of the scenario. The executive director performed analyses to estimate water availability under three conditions: 1) application of the proposed environmental flow standard, 2) application of the commission's current default methodology, and 3) no environmental flow requirements. Copies of the WAMs used in this analysis are available at: *http://www.tceq.state.tx.us/goto/eflows/rulemaking*.

For the Trinity River Basin scenario, applying either the default methodology or no instream flow or freshwater inflow requirement produces an annual availability of 83%. Application of the proposed standards also produced an annual availability of 83%. For the San Jacinto River Basin, no measurement points are proposed in the rule near the location of the scenario. In this case, no instream flow standards were applied in the analysis. However, the scenario would be subject to the proposed bay and estuary freshwater inflow standards. The minimum volumetric bay and estuary standards proposed in the rule were included in the WAM. Applying the commission's default methodology resulted in less water than would be available without instream flow or freshwater inflow requirements. Applying the bay and estuary freshwater inflow standard proposed by this rule resulted in less water than would be available under either application of the default methodology or application of no environmental flow requirements. The reliability of available water varied depending on the environmental flow condition. Reliability with application of either the bay and estuary freshwater inflow standard or no environmental flow requirements was comparable, and both of these conditions resulted in more reliable water than application of the default methodology. The executive director also considered whether reduction of the proposed standards would result in a significant increase in the yield of these projects and found that it did not. Based on the results of the analysis, the execu-

tive director determined that there would be no significant impact from implementation of the proposed standards.

The commission is not proposing to set aside any unappropriated water to protect the proposed environmental flow standards. The commission does not believe that, for the Trinity and San Jacinto Rivers, unappropriated water is available to protect the subsistence and base flows. Any unappropriated water that is available in these river basins is available only during relatively wet conditions. In theory, some water might be able to be set aside for high flow pulses. The commission is of the initial opinion that the environmental flow standards may be adequately protected by special conditions in water right permits or amendments for new appropriations of water in these basins. Special conditions are a more effective method to maximize the use of water by allowing water to be used for dual purposes. Special conditions to protect environmental flows may allow water permitted to downstream senior water rights, as well as return flows and permitted but unused water, to satisfy the special conditions. This proposed new section would implement TWC, §11.1471.

§298.230, Water Right Permit Conditions

The commission proposes new §298.230 relating to water right permit conditions. The proposed provision would require the commission to place special conditions in water right applications for new appropriations and amendments that would add additional appropriations to existing permits. The special conditions would be to protect the environmental flow standards established by the subchapter. Water right permit applications to divert or store 10,000 per acre-feet per year or less would not contain the special conditions relative to high flow pulses. This proposed new section would implement TWC, §11.134(b)(3)(D) and §11.1471.

§298.240, Schedule for Revision of Standards

The commission proposes new §298.240 to provide the schedule for re-examination of the environmental flow standards. The commission proposes to take up a possible rulemaking to change the standards ten years from the effective date of the rules. The commission notes that it is prohibited from providing that the rulemaking process occurs more frequently than once every ten years unless the stakeholders' workplan approved by the Advisory Group under TWC, §11.02362(p), calls for a more frequent schedule. The commission notes that, as of the time of proposal of these rules, it has not received an approved workplan from the stakeholder committee. The commission will consider changing this proposal on adoption of the rule if it has received an approved workplan by the date this rule is considered for adoption at a commission agenda. The commission is also of the opinion that should it receive an approved workplan after final adoption of this rule package, the commission is free to consider an amendment to this section and change the schedule more often than once every ten years. The proposed new section would implement TWC, §11.1471(f).

Subchapter C: Sabine, Neches Rivers, and Sabine Lake Bay.

The commission proposes Subchapter C to contain all of the environmental flow standards and rules specific to the basin and bay system composed of the Sabine and Neches Rivers, their associated tributaries, and Sabine Lake Bay. The science team delivered its report to the commission on November 30, 2009. The stakeholder committee delivered its recommendations to the commission on May 24, 2010. The commission understands that it is now its duty to adopt environmental flow standards under TWC, §11.02362(c)(5). This proposed new subchapter would implement the schedule established by the Advisory Group under TWC, §11.02362, and environmental flow standards required of the commission in TWC, §11.1471.

§298.250, Applicability and Purpose

The commission proposes new §298.250 to describe the purpose of Subchapter C and in what circumstances it applies.

§298.255, Definitions

The commission proposes a new §298.255 regarding definitions. The proposed section has definitions of terms that will apply only to this subchapter. The seasons, "fall," "spring," "summer," and "winter," are proposed to be defined because the proposed environmental flow standards for this basin and bay system vary by season. The definitions are the same as the definitions of the seasons in the recommendations of the science team. In §298.255(1), (2), and (7), the commission also proposes definitions for "average condition," "dry condition," and "wet condition." A range of base flow conditions - average, dry, and wet - is proposed to be defined consistent with the recommendations of the science team. In §298.255(5) the commission proposes a definition for "sound ecological environment." The proposed definition is the same definition as presented by the stakeholders.

§298.260, Findings

The commission proposes new §298.260 regarding findings related to sound ecological environments. The proposed finding regarding the ecological environment is in keeping with the stakeholder committee report. The proposed finding regarding maintenance of the ecological environment is based on the science team report. Additional information on the commission's reasoning for the proposed schedule of flow quantities and environmental flow standards can be found in this preamble under the analyses for §298.275 and §298.280. This proposed new section would implement TWC, §11.1471.

§298.265, Set Asides and Standards Priority Date

The commission proposes new §298.265 that would establish the priority date for any set-asides and any modeling of the environmental flow standards as the date the commission received the report from the science team, which was November 30, 2009.

§298.270, Calculation of Hydrologic Conditions

The commission proposes new §298.270 to explain the determination of hydrologic conditions for implementation and application of the standards by water right holders to whom the proposed standards apply.

§298.275, Schedule of Flow Quantities

The commission proposes new §298.275 to explain the implementation of the environmental flow standards for §298.280 The commission does not intend to be bound to use the exact wording of the section in water right permits issued after the adoption of these rules. However, this section does express how the commission intends to implement the proposed environmental flow standards in water right permit applications for new appropriations. Subsistence flows are intended to be the minimum flows below which the commission will not allow diversions or storage of water. Therefore, the water right holder may not divert or store water if the flow at the applicable measurement point is below the subsistence flow standard. The applicable base flow standard varies depending on the hydrologic condition. If the flow is above the subsistence flow standard but below the

dry base flow standard, then the water right holder may divert or store water down to the subsistence flow. If the flow at the applicable measurement point is above the base flow standard for the season, then the water right holder may store or divert water according to its permit as long as the flow at the measurement point does not fall below the applicable base flow standard. The commission proposes that two smaller magnitude pulse flows per season be allowed to pass if the flows are above the applicable base flow standard for the season and if the peak flow trigger level is reached at the measurement point. Under dry hydrologic conditions, in the spring and summer, only one of these smaller magnitude pulse flows per season need to be allowed to pass if the peak flow trigger level is reached at the measurement point. No smaller magnitude pulses need to be passed during the fall and winter seasons under dry hydrologic conditions. In addition to the two smaller magnitude high flow pulses, under wet conditions, the commission proposes that one larger magnitude high flow pulse per season also be allowed to pass if the peak flow trigger level is reached at the measurement point. Once the trigger conditions are met, the water right holder may not store or divert water until either the applicable pulse volume passes the measurement point or the applicable pulse duration has occurred. The commission does not propose that the water right holder somehow produce a pulse flow. Pulses occur because of high rainfall events. The commission does propose that, as described above, during high rainfall events in a specific season, the applicable high flow pulse be allowed to pass downstream. If in a particular season, the high flow pulse is not generated by rainfall events, then there would be no need to "catch up" or allow more than the applicable high flow pulses to pass in the following season. The commission specifically requests comments on alternative ways to implement the environmental flow standards of §298.280.

§298.280, Environmental Flow Standards

The commission proposes new §298.280 to provide the environmental flow standards of TWC, §11.1471, for the basin and bay system composed of the Sabine and Neches Rivers, associated tributaries, and Sabine Lake Bay. The commission based its decision on consideration of sound science and other public interests and relevant factors. In the absence of a recommendation from the stakeholders, which would have balanced science with other public interests, the commission proposes standards based on available information and recommendations from the science team. The measurement locations are those recommended by the science team, with the exception of USGS gage 08038000, Attoyac Bayou near Chireno, Texas. At the present time, daily discharge information is not publically available. For this location, the commission believes that the lack of readily accessible daily data could create implementation issues for specific water right holders who could be subject to an environmental flow standard at this location. Therefore, the commission does not propose environmental flow standards at this location. The proposed base and subsistence standards, and the proposed high flow pulse standards are those recommended by the science team. The science team did not recommend bay and estuary standards for Sabine Lake Bay. The executive director performed an analysis to address the issue of balancing human and other competing needs for water in the basin and bay system. The executive director did not look at every possible future water use scenario, but limited the selection of scenarios to those that could reasonably be expected to be implemented before the environmental flow standards are reconsidered in accordance with the schedule in §298.290. The executive director did not look at longer term water use scenarios, i.e. 50 years in the future, because there will be another opportunity to look at those long term scenarios through HB 3/SB 3's adaptive management provisions. Under those provisions, the standards will be re-examined based on improved science and the stakeholders will have another opportunity to re-evaluate the issue of balancing human and other competing needs for water in the basin and bay system.

The executive director reviewed the Regional Water Plans for Regions C, D, and I, as those regions are delineated by the Texas Water Development Board for the Regional Water Planning process. Based on this review, the executive director selected one future water use scenario for the balancing analysis from the Sabine River Basin and one from the Neches River Basin. For all evaluations, the executive director used the commission's WAM for the specific river basin and modified it by adding the selected scenario. Each scenario is different, therefore the application of criteria and reporting of results varies based on the specifics of the scenario. The executive director performed analyses to estimate water availability under three conditions: 1) application of the proposed environmental flow standard, 2) application of the commission's current default methodology, and 3) no environmental flow requirements. The commission's WAM for the Sabine River Basin accounts for Texas' obligations under the Sabine River Compact. Copies of the WAMs used in this analysis are available at: *http://www.tceq.state.tx.us/goto/eflows/rulemaking.*

For the Sabine River Basin scenario, applying either the default methodology or no instream flow requirement produces an annual availability of 97%. Application of the standards proposed in this rule produces an annual availability of 95% or a 2% decrease as compared to the amount available under the other environmental flow conditions. For the Neches River Basin scenario, the maximum annual availability under each of the three conditions varied slightly. The 50th percentile annual diversion amounts exhibited greater variation, with application of the proposed standards resulting in the lowest annual availability in this range, although this reduction is not significant.

The executive director also considered whether reduction of the proposed standards would result in a significant increase in the yield of these projects and found that it did not. Based on the results of the analysis, the executive director determined that there would be no significant impact from implementation of the proposed standards. The commission is not proposing to set aside any unappropriated water to protect the proposed environmental flow standards. The commission does not believe that, for the Sabine and Neches Rivers, unappropriated water is available to protect subsistence and base flows. Any unappropriated water that is available in these river basins is only available during relatively wet conditions. In theory, some water might be able to be set aside for high flow pulses. The commission is of the initial opinion that the environmental flow standards may be adequately protected by special conditions in new appropriations of water in these basins. The special conditions are a more effective method to maximize the use of water by allowing water to be used for dual purposes. Special conditions to protect environmental flows may allow water permitted to downstream senior water rights, as well as return flows and permitted but unused water, to satisfy the special conditions. This proposed new section would implement TWC, §11.1471.

§298.285, Water Right Permit Conditions

The commission proposes new §298.285 to require the commission to place special conditions in water rights for new appropriations and amendments that would add additional appropriations to existing permits. The special conditions would be to protect the environmental flow standards established by the subchapter. Water right permit applications to divert or store 10,000 acre-feet or less per year would not contain the special conditions relative to high flow pulses. This proposed new section would implement TWC, §11.134(b)(3)(D) and §11.1471.

§298.290, Schedule for Revision of Standards

The commission proposes new §298.290 to provide the schedule for re-examination of the environmental flow standards. The commission proposes to take up possible rulemaking to change the standards ten years from the date of adoption of the rules. The commission notes that it is prohibited from providing that the rulemaking process occurs more frequently than once every ten years, unless the stakeholders' workplan approved by the Advisory Group under TWC, §11.02362(p), calls for a more frequent schedule. The commission notes that, as of the time of proposal of these rules, it has not received an approved workplan from the stakeholder committee. The commission will consider changing this proposal on adoption of the rule, if it has received an approved workplan by the date this rule is considered for adoption at a commission agenda. The commission is also of the opinion that should it receive an approved workplan after final adoption of this rule package, the commission is free to consider an amendment to this section and change the schedule more often than once every ten years. This proposed new section would implement TWC, §11.1471(f).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst in the Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or any other unit of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules would implement provisions of HB 3/SB 3 by adopting appropriate environmental flow standards for the river and bay systems of the Sabine and Neches Rivers, Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay. The proposed rules would also establish procedures for implementing an adjustment of conditions included in a permit or amended water right in those river and bay systems.

The proposed rules do not include any new fees nor do they change existing ones. The new rules do propose specific standards that will be applied by TCEQ staff during technical review of applications for new appropriations of state water. These proposed standards are the result of stakeholder recommendations and will replace the methodology currently used to determine streamflow requirements. Once the environmental flow standards are adopted, the standards will be a part of the commission's water rights permitting process. This may affect new appropriations and amendments that increase the amount of water to be taken, stored, or diverted, which could result in an applicant having to secure an additional source of water. However, streamflow restrictions are currently applied to new appropriations of water under existing practice and environmental flow standards as proposed in the rule are expected to function similarly to current streamflow restrictions. Any effect of the proposed rules on an application for new appropriations would depend upon the type of application, the location of the application in its basin, and the overall water availability in that basin. In the Sabine and Neches River Basins, staff's preliminary analysis indicates that the impacts of the proposed standards may be greater for applications for direct diversions than for applications that request a new appropriation of water from an existing reservoir. In the Trinity and San Jacinto River Basins, staff's preliminary analysis indicates similar types of impacts. In addition, bay and estuary inflow requirements would be considered in availability determinations for applications in the Trinity and San Jacinto River Basins and the amount of water granted in an application could be lower.

Overall, because the proposed standards are expected to function similarly to current streamflow restrictions for applications, the proposed standards are not expected to have significant fiscal implications for units of state or local government including river authorities, cities, or water districts.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be to provide certainty for the state's water management and development as well as adequate protection of the state's streams, rivers, bays, and estuaries.

Individuals and businesses are not expected to experience significant fiscal implications as a result of the proposed rules. The proposed rules will provide appropriate environmental flow standards for the river and bay systems of the Sabine and Neches Rivers, Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay.

The proposed rules may affect new appropriations and amendments that increase the amount of water to be taken, stored, or diverted, which could result in an applicant having to secure an additional source of water. However, because streamflow restrictions are currently applied to new appropriations of water under existing practice and the proposed standards are expected to function similarly to current streamflow restrictions for applications, the proposed standards are not expected to have significant fiscal implications for businesses and individuals.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration or implementation of the proposed rules. The proposed rules will provide appropriate environmental flow standards for the river and bay systems of the Sabine and Neches Rivers and Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay.

The proposed rules may affect new appropriations and amendments that increase the amount of water to be taken, stored, or diverted, which could result in an applicant having to secure an additional source of water. However, because streamflow restrictions are currently applied to new appropriations of water under existing practice and the proposed environmental flow standards would function similarly to current streamflow restrictions, no adverse fiscal implications are anticipated for small or micro-businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are not expected to

adversely affect small or micro-businesses for the first five years that they are in effect, the rules are necessary to protect public health and safety, and because the rules are required to implement state law.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated these proposed rules and performed an analysis of whether these proposed rules require a regulatory impact analysis under Texas Government Code, §2001.0225. These amendments are not a "major environmental rule" under §2001.0225 because although the specific intent of the rulemaking is to protect the environment, these rules do not potentially adversely affect in a material way the economy or a sector of the economy. Additionally, the purpose of these rules is not to exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government to implement a state and federal program, or to adopt rules solely under the general powers of the agency instead of specific state law. This rulemaking is specifically required by TWC, §11.1471. The purpose of these rules is to establish environmental flow standards, set-asides (if available), and procedures for implementing an adjustment of these standards, if required in a permit or amendment for the river and bay systems consisting of the Sabine and Neches Rivers and Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay, as required by §11.1471(a). Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225, for this rulemaking.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these rules is to establish environmental flow standards, set-asides (if available), and procedures for implementing an adjustment of these standards, if required in a permit or amendment for the river and bay systems consisting of the Sabine and Neches Rivers and Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay, as expressly required by TWC, §11.1471(a). Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, because under TWC, §11.147(e-1), these rules cannot be retroactively applied to water rights issued before September 1, 2007; the subject proposed regulations do not affect a landowner's rights in private real property. Thus, this rulemaking does not burden (constitutionally) nor restricts or limits the owner's right to existing property and reduces its value by 25% or more beyond that which would otherwise exist in the absence of the regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et. seq.,* and, therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; and, 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rules include those contained in 31 TAC §501.33. The proposed rules implement HB 3/SB 3, which established the environmental flows process to provide certainty in water management and development and to provide adequate protection of the state's streams rivers, bays, and estuaries. Since one of the purposes of the proposed rules is to protect coastal natural resources, the rules are consistent with CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies, because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas, and, because one of the purposes of the proposed rules is to protect coastal natural resources.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on December 16, 2010, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Natalia Henricksen, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-049-298-OW. The comment period closes December 20, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For

further information, please contact Ron Ellis, Water Rights Permitting and Availability, (512) 239-1282.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§298.1, 298.5, 298.10, 298.15, 298.20, 298.25

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §§5.102, concerning General Powers; 5.103, concerning Rules; and 5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC. The new sections are also proposed under TWC, §§5.506, concerning Emergency Suspension of Permit Condition Relating to, and Emergency Authority to Make Available Water Set Aside For, Beneficial Inflows to Affected Bays and Estuaries and Instream Uses; 11.0235, concerning Policy Regarding Waters of the State; 11.147, concerning Effects of Permit on Bays and Estuaries and Instream Uses; 11.148, concerning Emergency Suspension of Permit Conditions and Emergency Authority to Make Available Water Set Aside for Environmental Flows; and 11.1471, concerning Environmental Flow Standards and Set-Asides.

The proposed new sections implement TWC, §§5.102, 5.103, 5.105, 5.506, 11.0235, 11.147, 11.148, and 11.1471.

§298.1. Definitions.

The following words or phrases, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise, or unless a subchapter has a different definition that only applies to that subchapter:

(1) Base flow--the range of average flow conditions, in the absence of significant rainfall events, that may vary depending on current weather patterns.

(2) Environmental flow regime--a schedule of flow quantities that reflects seasonal and yearly fluctuations that typically would vary geographically, by specific location in a watershed.

(3) Environmental flow standards--those requirements contained in this chapter, adopted by the commission under Texas Water Code, §11.1471.

(4) Lower Rio Grande--the main stem of the Rio Grande from just above Falcon Reservoir to the mouth of the Rio Grande.

(5) Measurement point--a specific geographical location on a watercourse where environmental flow standards are established.

(6) Middle Rio Grande--the main stem of the Rio Grande from just above Amistad Reservoir to just above Falcon Reservoir.

(7) Pulse or high flow pulse--relatively short-duration, high flows within the stream channel that occur during or immediately following a storm event.

(8) Subsistence flow--the minimum streamflow needed during critical drought periods to maintain tolerable water quality conditions and to provide minimal aquatic habitat space for the survival of aquatic organisms.

(9) USGS--United States Geological Survey.

(10) Water right holder--a person or entity that owns a valid certificate of adjudication, certified filing, or water right permit.

(11) Water right permit--a valid certificate of adjudication, certified filing, or water right permit. The term does not include exempt water users, such as domestic and livestock water users.

§298.5. General.

This chapter contains the environmental flow standards and set-asides required by Texas Water Code (TWC), §11.1471. The commission adopts these environmental flow standards for each river basin and bay system in this state as the commission receives recommendations from basin and bay area stakeholders in accordance with TWC, §11.02362. The commission finds that the environmental flow standards adopted herein are adequate to support a sound ecological environment, to the maximum extent reasonable, considering other public interests and other relevant factors as described in TWC, §11.1471(b). The environmental flow standards adopted herein are schedules of flow quantities, reflecting seasonal and yearly fluctuations that vary geographically by specific location in a river basin and bay system.

§298.10. Applicability.

(a) This chapter only relates to a permit for a new appropriation of water or to an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted, and the chapter applies only to:

(1) Water appropriated under a permit for a new appropriation of water, the application for which was pending with the commission on September 1, 2007, or is filed with the commission on or after that date; or

(2) The increase in the amount of water authorized to be stored, taken, or diverted under an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted, and the application for which was pending with the commission on September 1, 2007, or was filed with the commission on or after that date.

(b) This chapter does not otherwise amend or restrict the commission's authority to impose special conditions on water right permits, including special conditions to protect environmental flows. The commission retains any and all authority to place special conditions on interbasin transfers; on amendments, such as an amendment to move a diversion point upstream; and on authorizations under Texas Water Code (TWC), §11.042 and §11.046, to protect environmental flows or senior water rights. This chapter also does not expand the commission's authority to impose special conditions on water right permits beyond the authority granted to the commission in TWC, Chapter 11, or expressed by the commission in Chapter 297 of this title (relating to Water Rights, Substantive).

§298.15. Special Conditions to Protect Environmental Flow Standards and Set Asides.

(a) The commission may not grant an appropriation for state water that has been set aside by the commission under this chapter to meet downstream instream flow needs or freshwater inflow needs. The commission may not issue a permit for a new appropriation or an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted if the issuance of the permit or amendment would impair an environmental flow set-aside established by this chapter.

(b) For purposes of determining any environmental flow conditions in any water right permit application to which this chapter applies that are necessary to maintain: freshwater inflows to an affected bay and estuary system; existing instream uses and water quality of a stream or river; or fish and wildlife habitats; the commission shall apply any applicable environmental flow standard, including any environmental flow set-aside, adopted in this chapter, instead of considering the factors specified in Texas Water Code, §11.147(b) - (e) and §§297.53 - 297.56 of this title (relating to Habitat Mitigation; Water Quality Effects; Estuarine Considerations; and Instream Uses, respectively).

(c) The commission will incorporate into every water right permit any condition, restriction, limitation, or provision, as provided in Chapter 297 of this title (relating to Water Rights, Substantive) that is reasonably necessary to protect environmental flow standards, to the maximum extent reasonable, considering other public interests and other relevant factors.

§298.20. Priority Date for Set-Asides.

An environmental flow standard or set-aside established under this chapter for a river basin and bay system other than the middle and lower Rio Grande shall be assigned a priority date corresponding to the date the commission receives environmental flow regime recommendations from the applicable basin and bay expert science team as set forth in these rules. This priority date shall be included in the appropriate water availability models maintained by the commission in connection with an application for a permit for a new appropriation or for an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted.

§298.25. Process for Adjusting Environmental Flow Conditions in Certain Permits.

(a) On the petition of the executive director, the commission may amend a water right permit for a new appropriation or an amendment for an increase in the amount of water authorized to be stored, taken, or diverted issued after September 1, 2007, in order to adjust environmental flow special conditions, if the commission determines, through the process set forth herein, that such an adjustment is appropriate to achieve compliance with applicable environmental flow standards adopted in this chapter.

(b) A petition to adjust an environmental flow special condition shall be prepared by the executive director in the manner of an original application for a permit and have a title that indicates that it is to adjust environmental flow special conditions. The petition shall be filed with the Chief Clerk in the same manner as a water right permit application.

(c) Notice of the petition, with an opportunity for public comment, shall be mailed by the executive director by first-class mail, postage prepaid, to each water right holder of record within the basin and to all navigation districts within the river basin concerned not less than 30 days before the date of action on the petition by the commission. The executive director will also cause a copy of the notice to be posted to the commission's Web site at least 30 days before the date of action on the petition by the commission. A temporary outage of service of the commission's Web site during the 30 day notice period does not prevent the commission's consideration of the petition. The inadvertent failure of the executive director to mail notice to a navigation district that is not an appropriator of water does not prevent the commission's consideration of the petition.

(d) The commission may act on the petition without holding a public hearing. The commission shall consider all written public comment received on the petition prior to the commission's decision on the petition.

(e) A motion for rehearing of the commission's action must be filed no later than 23 days after the chief clerk mails (or otherwise transmits) the decision on the petition and provides instructions for requesting that the commission reconsider the decision or hold a contested case hearing. The following may file a motion for rehearing under this chapter:

(1) the commission on its own motion;

(2) the executive director;

(3) the water right holder; and

(4) affected persons, when authorized by law.

(f) A motion for rehearing by an affected person must be in writing, and must be filed with the chief clerk within the time provided by subsection (e) of this section.

(g) If the motion for rehearing is granted, the commission may refer the matter to the State Office of Administrative Hearings.

(h) The environmental flow adjustment, in combination with any previous adjustments made under this section may not increase the amount of the environmental flow pass-through or release requirement for a water right permit by more than 12.5% of the annualized total of that requirement contained in the permit as issued or of that requirement contained in the amended water right and applicable only to the increase in the amount of water authorized to be stored, taken, or diverted under the amended water right permit. Any new permit conditions must be consistent with the environmental flow standards to the maximum extent practicable.

(1) For environmental flow conditions expressed in cubic feet per second, the maximum adjustment is calculated by multiplying the annual amount of the original standard in cubic feet per second by 12.5% to generate the adjustment and calculate the new condition expressed in cubic feet per second. The adjustment, in combination with all previous adjustments, cannot increase the flow requirement above the sum of the original flow requirement plus the original 12.5% adjustment.

(2) For environmental flow conditions, such as a pulse, expressed with multiple characteristics, such as frequency, peak flow, volume, and duration, the maximum adjustment is calculated by multiplying the original pulse volume component by 12.5% to generate the maximum adjustment amount. The combination of all previous adjustments, and any new adjustment, cannot increase the pulse volume above the sum of the original pulse volume requirement plus the original 12.5% adjustment.

(i) The environmental flow adjustment must be based on appropriate consideration of the priority dates and diversion locations of any other water rights granted in the same river basin that are subject to adjustment under this section.

(j) The environmental flow adjustment must be based on appropriate consideration of any voluntary contributions to the Texas Water Trust, and of any voluntary amendments to existing water rights to change the use of a specified quantity of water to or add a use of a specified quantity of water for instream flows dedicated to environmental needs or bay and estuary inflows as authorized by Texas Water Code, §11.0237(a), that actually contribute toward meeting the applicable environmental flow standard. Any water right holder who makes a contribution or amends a water right as described herein is entitled to appropriate credit for the benefits of the contribution or amendment against the adjustment of the holder's existing water right permit conditions under this section.

(1) Water rights that are voluntarily contributed to the Texas Water Trust or voluntary amendments to change the use where the total volume of water is available in at least 75% of the years, are entitled to credit the contribution or amendment against the adjustment only by spreading out the amount contributed over the permit's time interval; and

(2) Water rights that are voluntarily contributed to the Texas Water Trust or voluntary amendments to change the use where the reliability of the water does not meet the criteria that the water is available in at least 75% of the years, or amendments to add a use of a specified quantity of water for instream flows dedicated to environmental needs or bay and estuary inflows are entitled to credit the

contribution or amendment against the adjustment only by spreading out one half of the amount contributed over the permit's time interval.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006379
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 239-0177

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SUBCHAPTER B. TRINITY, SAN JACINTO RIVERS, AND GALVESTON BAY

30 TAC §§298.200, 298.205, 298.210, 298.215, 298.220, 298.225, 298.230, 298.240

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §§5.102, concerning General Powers; 5.103, concerning Rules; and 5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC. The new sections are also proposed under TWC, §§5.506, concerning Emergency Suspension of Permit Condition Relating to, and Emergency Authority to Make Available Water Set Aside For, Beneficial Inflows to Affected Bays and Estuaries and Instream Uses; 11.0235, concerning Policy Regarding Waters of the State; 11.147, concerning Effects of Permit on Bays and Estuaries and Instream Uses; 11.148, concerning Emergency Suspension of Permit Conditions and Emergency Authority to Make Available Water Set Aside for Environmental Flows; and 11.1471, concerning Environmental Flow Standards and Set-Asides.

The proposed new sections implement TWC, §§5.102, 5.103, 5.105, 5.506, 11.0235, 11.147, 11.148, and 11.1471.

§298.200. Applicability and Purpose.

This subchapter contains the environmental flow standards for the Trinity and San Jacinto rivers, their associated tributaries, and Galveston Bay. Provisions of this subchapter control over any provisions of Subchapter A of this chapter (relating to General Provisions) for purposes of environmental flow standards and regulation in the Trinity and San Jacinto rivers, their associated tributaries, and Galveston Bay.

§298.205. Definitions.

The following words or phrases have the following meanings, in this subchapter, unless the context clearly indicates otherwise:

(1) Fall--the period of time September through November, inclusive.

(2) Spring--the period of time March through May, inclusive.

(3) Sound ecological environment--a resilient, functioning ecosystem characterized by intact, natural processes, and a balanced, integrated, and adaptive community of organisms comparable to that of the natural habitat of a region.

(4) Summer--the period of time June through August, inclusive.

(5) Winter--the period of time December through February, inclusive.

§298.210. Findings.

(a) The Trinity and San Jacinto rivers, their associated tributaries, Galveston Bay, and the associated estuaries are healthy and sound ecological environments.

(b) The commission finds that these sound ecological environments can best be maintained by a set of flow standards that implement a schedule of flow quantities that contain subsistence flow, base flow, and one level of high flow pulses at defined measurement points. Minimum flow levels for these components will vary by season and by year since the amount of precipitation and, therefore, whether a system is in subsistence or base flow conditions, will vary from year to year and within a year from season to season, and the number of pulses protected will also vary with the amount of precipitation.

§298.215. Standards Priority Date.

The priority date for the environmental flow standards and set-asides established by this subchapter is December 1, 2009.

§298.220. Schedule of Flow Quantities.

(a) The environmental flow standards adopted by this subchapter constitute a schedule of flow quantities made up of subsistence flow, base flow, and one level of high flow pulses. Environmental flow standards are established at six separate measurement locations in §298.230 of this title (relating to Water Right Permit Conditions).

(b) Subsistence flow. For a water right holder to which an environmental flow standard applies, at a measurement point that applies to the water right, the water right holder may not store or divert water unless the flow at the measurement point is above the subsistence flow standard for that point. If the flow at the measurement point is above the subsistence flow standard but below the applicable base flow standard, then the water right holder may divert or store water according to its permit, subject to senior and superior water rights, as long as the flow at the measurement point does not fall below the applicable subsistence flow standard.

(c) Base flow. The applicable base flow standard varies depending on the seasons as described in §298.230 of this title. For a water right holder to which an environmental flow standard applies, at a measurement point that applies to the water right, the water right is subject to a base flow standard. For a water right holder to which an environmental flow standard applies, at a measurement point that applies to the water right, when the flow at that point is above the applicable base flow standard, and below the applicable peak flow trigger level, the water right holder may store or divert water according to its permit, subject to senior and superior water rights, as long as the flow at the measurement point does not fall below the applicable base flow standard.

(d) High flow pulses. High flow pulses are relatively short-duration; high flows within the watercourse that occur during or immediately following a storm event.

(1) Two pulses per season are to be passed (i.e., no storage or diversion by an applicable water right holder) if the flows are above the applicable base flow standard, and if the peak flow trigger level is met at the measurement point. The water right holder shall not divert or store water until either the volume amount has passed the measurement point or the duration time has passed since the peak flow trigger rate occurred.

(2) If the peak flow trigger rate does not occur in a season, then the water right holder need not stop storing or diverting water to produce a peak. The water right holder is not required to store water to be released later to produce a peak.

(3) For purposes of this section, compliance with seasonal high flow pulse frequency requirements is determined by Fall, defined as October through November; Spring, defined as March through June; Summer, defined as July through September; and Winter, defined as December through February.

(4) Each season is independent of the preceding and subsequent seasons with respect to high flow pulse frequency.

§298.225. Environmental Flow Standards.

(a) A water right application in the Trinity or San Jacinto river basins, or associated coastal basins that drains to Galveston Bay, which increases the amount of water authorized to be stored, taken or diverted as described in §298.10 of this title (relating to Applicability), shall not reduce the long-term frequency at which the following volumes of freshwater inflows occur.
Figure: 30 TAC §298.225(a)

(b) The following environmental flow standards are established for the following described measurement points:

(1) West Fork Trinity River near Grand Prairie, Texas, generally described as USGS gage 08049500, and more specifically described as Latitude 32° 45' 45"; Longitude 96° 59' 40".
Figure: 30 TAC §298.225(b)(1)

(2) Trinity River near Dallas, Texas, generally described as USGS gage 08057000, and more specifically described as Latitude 32° 46' 29"; Longitude 96° 49' 18".
Figure: 30 TAC §298.225(b)(2)

(3) Trinity River near Oakwood, Texas, generally described as USGS gage 08065000, and more specifically described as Latitude 31° 38' 54"; Longitude 95° 47' 21".
Figure: 30 TAC §298.225(b)(3)

(4) Trinity River near Romayor, Texas, generally described as USGS gage 08066500, and more specifically described as Latitude 30° 25' 30"; Longitude 94° 51' 02".
Figure: 30 TAC §298.225(b)(4)

(5) East Fork San Jacinto River, Cleveland, Texas, generally described as USGS gage 08070000, and more specifically described as Latitude 30° 20' 11"; Longitude 95° 06' 14".
Figure: 30 TAC §298.225(b)(5)

(6) West Fork San Jacinto River near Conroe, Texas, generally described as USGS gage 08068000, and more specifically described as Latitude 30° 14' 40"; Longitude 95° 27' 25".
Figure: 30 TAC §298.225(b)(6)

§298.230. Water Right Permit Conditions.

(a) For water right permits with an authorization to store or divert more than 10,000 acre-feet per year in the Trinity and San Jacinto River basins, and to which the environmental flow standards apply, that are issued after the effective date of this subchapter, the water right permit or amendment shall contain flow restriction special conditions that are adequate to protect the environmental flow standards of this subchapter, to the maximum extent reasonable, considering other public interests and other relevant factors.

(b) For water right permits with an authorization to store or divert 10,000 acre-feet or less per year in the Trinity and San Jacinto river basins and to which the environmental flow standards apply, that are issued after the effective date of this subchapter, the water right permit or amendment shall contain flow restriction special conditions that are adequate to protect the environmental flow standards of this subchapter, to the maximum extent reasonable, considering other public interests and other relevant factors; however, no special conditions are necessary to preserve or pass high flow pulses.

§298.240. Schedule for Revision of Standards.

The environmental flow standards or environmental flow set-asides adopted herein for the Trinity and San Jacinto rivers, their associated tributaries, and Galveston Bay may be revised by the commission through the rulemaking process. The final revised rules shall be effective no sooner than ten years from the effective date of this rule, unless the Trinity and San Jacinto basin and bay area stakeholder committee submits a work plan approved by the advisory group under Texas Water Code, §11.02362(p), that provides for a period review to occur more frequently. In that event, the commission may provide for the rulemaking process to be undertaken in conjunction with the periodic review if the commission determines that schedule to be appropriate. The rulemaking process shall include participation of stakeholders having interests in the Trinity and San Jacinto Rivers, their associated tributaries, and Galveston Bay.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0177

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SUBCHAPTER C. SABINE, NECHES RIVERS, AND SABINE LAKE BAY

30 TAC §§298.250, 298.255, 298.260, 298.265, 298.270, 298.275, 298.280, 298.285, 298.290

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §§5.102, concerning General Powers; 5.103, concerning Rules; and 5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC. The new sections are also proposed under TWC, §§5.506, concerning Emergency Suspension of Permit Condition Relating to, and Emergency Authority to Make Available Water Set Aside For, Beneficial Inflows to Affected Bays and Estuaries and Instream Uses; 11.0235, concerning Policy Regarding Waters of the State; 11.147, concerning Effects of Permit on Bays and Estuaries and Instream Uses; 11.148, concerning Emergency Suspension of Permit Conditions and Emergency Authority to Make Available Water Set Aside for Environmental Flows; and 11.1471, concerning Environmental Flow Standards and Set-Asides.

The proposed new sections implement TWC, §§5.102, 5.103, 5.105, 5.506, 11.0235, 11.147, 11.148, and 11.1471.

§298.250. Applicability and Purpose.

This subchapter contains the environmental flow standards for the Sabine and Neches Rivers, their associated tributaries, and Sabine Lake Bay. Provisions of this subchapter control over any provisions of Subchapter A of this chapter (relating to General Provisions) for purposes of environmental flow standards and regulation in the Sabine and Neches Rivers, their associated tributaries, and Sabine Lake Bay.

§298.255. Definitions.

The following words or phrases have the following meanings in this subchapter, unless the context clearly indicates otherwise:

(1) Average condition--the hydrologic condition that is neither a wet condition nor a dry condition.

(2) Dry condition--the hydrologic condition determined by the cumulative upstream storage that would be exceeded more than 75% of the time based on full exercise of all water rights over a period from 1940 to 1998, when the monthly upstream storage conditions are ranked from driest to wettest.

(3) Fall--the period of time October through December, inclusive.

(4) Spring--the period of time April through June, inclusive.

(5) Sound ecological environment--an ecological environment that: supports a healthy diversity of fish and other aquatic life; sustains a full complement of important species; provides for all major habitat types including rivers and streams, reservoirs, and estuaries; sustains key ecosystem processes; and maintains water quality adequate for aquatic life.

(6) Summer--the period of time July through September, inclusive.

(7) Wet condition--the hydrologic condition determined by the cumulative upstream storage that would be exceeded less than 25% of the time based on full exercise of all water rights over a period from 1940 to 1998, when the monthly upstream storage conditions are ranked from driest to wettest.

(8) Winter--the period of time January through March, inclusive.

§298.260. Findings.

(a) The Sabine and Neches Rivers, their associated tributaries, Sabine Lake Bay, and the associated Sabine-Neches estuary are substantially sound ecological environments.

(b) The commission finds that this sound ecological environment can best be maintained by a set of flow standards that implement a schedule of flow quantities that includes subsistence flow, base flow, and two levels of high flow pulses at defined measurement points. Minimum flow levels for these components shall vary by season and by hydrological conditions since the amount of precipitation and, therefore, streamflow varies from year to year.

§298.265. Set-Asides and Standards Priority Date.

The priority date for the environmental flow standards and set-asides established by this subchapter is November 30, 2009.

§298.270. Calculation of Hydrologic Conditions.

(a) The determination of the hydrologic condition for a particular season shall be determined once per season. The conditions present on the last day of the month of the preceding season will determine the hydrologic condition for the following season. For each measurement point specified in this section, the cumulative storage in the major reservoirs located upstream of that measurement point will determine the hydrologic condition.

(b) Measurement points, associated reservoirs, and storage levels and conditions are:
Figure: 30 TAC §298.270(b)

§298.275. Schedule of Flow Quantities.

(a) The environmental flow standards adopted by this subchapter constitute a schedule of flow quantities made up of subsistence flow, base flow, and high flow pulses. Environmental flow standards are established for eleven measurement points in §298.270 of this title (relating to Calculation of Hydrologic Conditions) and this section.

(b) Subsistence flow. For a water right holder to which an environmental flow standard applies, at a measurement point that applies to the water right, the water right holder may not store or divert water, unless the flow at the measurement point is above the subsistence flow standard for that point. If the flow at the measurement point is above the subsistence flow standard but below the applicable base flow level, then the water right holder may divert or store water according to its permit, subject to senior and superior water rights, as long as the flow at the measurement point does not fall below the applicable subsistence flow standard.

(c) Base flow. The applicable base flow level varies depending on the hydrologic conditions described in §298.270 of this title. For a water right holder to which an environmental flow standard applies, at a measurement point that applies to the water right, the water right holder is subject to the base flow standard for the climatic condition prevailing at that time, i.e., the water right will be subject to either: a dry base flow; an average base flow; or a wet base flow standard. For a water right holder to which an environmental flow standard applies, at a measurement point that applies to the water right, when the flow at the measurement point is above the applicable base flow standard, but below any applicable high flow pulse levels, the water right holder may store or divert water according to its permit, subject to senior and superior water rights, as long as the flow at the measurement point does not fall below the applicable base flow standard.

(d) High flow pulses. High flow pulses are relatively short-duration; high flows within the watercourse that occur during or immediately following a storm event. They flush fine sediment deposits and waste products, restore normal water quality following prolonged low flows, and provide longitudinal connectivity for species movement along the river.

(1) Two smaller magnitude pulses per season are to be passed (i.e., no storage or diversion by an applicable water right holder), if the hydrologic condition is average or wet, and if the peak flow trigger level is met at the measurement point. The water right holder shall not divert or store water until either the volume amount has passed the measurement point, or the duration time has passed since the peak flow trigger rate occurred. Under dry hydrologic conditions during the spring and summer seasons, only one smaller-magnitude pulse shall be passed, if the peak flow trigger level is met at the measurement point. Under dry hydrologic conditions during the fall and winter, no high flow pulses need be passed.

(2) During wet conditions and in addition to the two smaller-magnitude pulses, a single larger-magnitude pulse must be passed; a water right holder shall not divert or store water until either the volume amount has passed the measurement point, or the duration time has passed since the peak flow trigger rate occurred.

(3) If the peak flow trigger rate does not occur in a season, then the water right holder need not stop storing or diverting to produce

a peak. The water right holder is not required to release water lawfully stored to produce a peak.

(4) Each season is independent of the preceding and subsequent seasons with respect to high flow pulse frequency.

§298.280. Environmental Flow Standards.

The following environmental flow standards are established for the following described measurement points:

(1) Big Sandy Creek near Big Sandy, Texas, generally described as United States Geological Survey (USGS) gage 08019500, and more particularly described as Latitude 32° 36' 14"; Longitude 95° 05' 29".
Figure: 30 TAC §298.280(1)

(2) Sabine River near Gladewater, Texas, generally described as USGS gage 08020000, and more particularly described as Latitude 32° 31' 37"; Longitude 94° 57' 36".
Figure: 30 TAC §298.280(2)

(3) Sabine River near Beckville, Texas, generally described as USGS gage 08022040, and more particularly described as Latitude 32° 19' 38"; Longitude 94° 21' 12".
Figure: 30 TAC §298.280(3)

(4) Sabine River near Bon Wier, Texas, generally described as USGS gage 08028500, and more particularly described as Latitude 30° 44' 49"; Longitude 93° 36' 30".
Figure: 30 TAC §298.280(4)

(5) Big Cow Creek near Newton, Texas, generally described as USGS gage 08029500, and more particularly described as Latitude 30° 49' 08"; Longitude 93° 47' 08".
Figure: 30 TAC §298.280(5)

(6) Sabine River near Ruliff, Texas generally described as USGS gage 08030500, and more particularly described as Latitude 30° 18' 13"; Longitude 93° 44' 37".
Figure: 30 TAC §298.280(6)

(7) Neches River at Neches, Texas, generally described as USGS gage 08032000, and more particularly described as Latitude 31° 53' 32"; Longitude 95° 25' 50".
Figure: 30 TAC §298.280(7)

(8) Neches River at Rockland, Texas, generally described as USGS gage 08033500, and more particularly described as Latitude 31° 01' 30"; Longitude 94° 23' 58".
Figure: 30 TAC §298.280(8)

(9) Angelina River, near Alto, Texas, generally described as USGS gage 08036500, and more particularly described as Latitude 31° 40' 10"; Longitude 94° 57' 24".
Figure: 30 TAC §298.280(9)

(10) Neches River at Evadale, Texas, generally described as USGS gage 08041000, and more particularly described as Latitude 30° 21' 20"; Longitude 94° 05' 35".
Figure: 30 TAC §298.280(10)

(11) Village Creek near Kountze, Texas, generally described as USGS gage 08041500, and more particularly described as Latitude 30° 23' 52"; Longitude 94° 15' 48".
Figure: 30 TAC §298.280(11)

§298.285. Water Right Permit Conditions.

(a) For water right permits with an authorization to store or divert more than 10,000 acre-feet per year in the Sabine and Neches river basins and to which the environmental flow standards apply, that are issued after the effective date of this subchapter, the water right permit or amendment shall contain flow restriction special conditions that are adequate to protect the environmental flow standards of this subchapter, to the maximum extent reasonable, considering other public interests and other relevant factors.

(b) For water rights permits with an authorization to store or divert 10,000 acre-feet or less per year in the Sabine and Neches river basins and to which the environmental flow standards apply, that are issued after the effective date of this subchapter, the water right permit or amendment shall contain flow restriction special conditions that are adequate to protect the environmental flow standards of this subchapter, to the maximum extent reasonable, considering other public interests and other relevant factors; however, no special conditions are necessary to preserve or pass high flow pulses.

§298.290. Schedule for Revision of Standards.

The environmental flow standards or environmental flow set-asides adopted herein for the Sabine and Neches Rivers, their associated tributaries, and Sabine Lake Bay may be altered by the commission through the rulemaking process. The final revised rules shall be effective no sooner than ten years from the effective date of this rule, unless the Sabine and Neches basin and bay area stakeholder committee submits a work plan approved by the advisory group under Texas Water Code, §11.02362(p), that provides for a period review to occur more frequently. In that event, the commission may provide for the rulemaking process to be undertaken in conjunction with the periodic review if the commission determines that schedule to be appropriate. The rulemaking process shall include participation of stakeholders having interests in the Sabine and Neches Rivers, their associated tributaries, and Sabine Lake Bay.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006381
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 239-0177

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER L. PROCEDURES FOR PROTESTING PRELIMINARY FINDINGS OF TOTAL TAXABLE VALUE

34 TAC §§9.4301 - 9.4313

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Comptroller of Public Accounts proposes the repeal of §§9.4301 - 9.4313, concerning Subchapter L, Procedures for Protesting Preliminary Findings of Total Taxable Value, to be replaced with new §§9.4301 - 9.4317 in renamed Subchapter L, Procedures for Protesting Comptroller Property Value Study and Audit Findings. The proposed repeal of §§9.4301 - 9.4313 and new §§9.4301 - 9.4317 are, in part, the result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 9, Subchapter L, conducted by the comptroller. The rule review was performed pursuant to Government Code, §2001.039 and resulted in a determination that the reasons for initially adopting §§9.4301 - 9.4313 continue to exist. Sections 9.4301 - 9.4313 are being repealed and replaced to provide added clarification to and improve efficiency of the protest process.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the repeals will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined the repeals would benefit the public by improving the administration of local property valuation and taxation. There would be no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the repeals.

Comments on the repeals may be submitted to Deborah Cartwright, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711-3528.

The repeals are proposed under Government Code, §403.303(c) and (e) which provide for the comptroller to adopt rules governing the conduct of protest hearings and provisions for exceptions to comptroller decisions on protests.

The repeals implement Government Code, §403.303(c) and (e).

§9.4301. Definitions.

§9.4302. Intent, Scope, and Construction of Subchapter H.

§9.4303. General Provisions.

§9.4304. Changes in Preliminary Certification.

§9.4305. Extensions of Time.

§9.4306. Who May Protest.

§9.4307. Filing a Protest.

§9.4308. Prehearing Matters.

§9.4309. Scheduling a Protest Hearing.

§9.4310. Administrative Law Judges Powers.

§9.4311. Conduct of Hearing.

§9.4312. Proposed Decision, Exceptions.

§9.4313. Final Decision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 4, 2010.

TRD-201006255
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 475-0387

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SUBCHAPTER L. PROCEDURES FOR PROTESTING COMPTROLLER PROPERTY VALUE STUDY AND AUDIT FINDINGS

34 TAC §§9.4301 - 9.4317

The Comptroller of Public Accounts proposes new §§9.4301 - 9.4317, concerning new Subchapter L, Procedures for Protesting Comptroller Property Value Study and Audit Findings, to replace §§9.4301 - 9.4313. The proposal of §§9.4301 - 9.4317 and repeal of §§9.4301 - 9.4313 are, in part, the result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 9, Subchapter L, conducted by the comptroller. The rule review was performed pursuant to Government Code, §2001.039 and resulted in a determination that the reasons for initially adopting §§9.4301 - 9.4313 continue to exist. Sections 9.4301 - 9.4317 are proposed, and §§9.4301 - 9.4313 are proposed for repeal, to provide added clarification to and improve efficiency of the protest process.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rules will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be by improving the administration of local property valuation and taxation. The proposed new rules would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rules.

Comments on the proposal may be submitted to Deborah Cartwright, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711-3528.

The new sections are proposed under Government Code, §403.303(c) and (e) which provide for the comptroller to adopt rules governing the conduct of protest hearings and provisions for exceptions to comptroller decisions on protests.

The new sections implement Government Code, §403.303(c) and (e).

§9.4301. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agent--A petitioner may designate an agent to act on behalf of the petitioner in protesting comptroller's findings pursuant to this subchapter. Except as provided in paragraph (7) of this section, a petitioner may designate only one agent per protest. The agent is the individual that the petitioner, if acting through an agent, is required to designate in the petition to perform the following activities on behalf of the petitioner:

(A) receive and act on all notices, orders, decisions, exceptions, replies to exceptions, and any other communications regarding the petitioner's protest;

(B) resolve any matter raised in petitioner's protest;

(C) argue and present evidence at any hearing on petitioner's protest and authorize individuals other than the agent to argue and present evidence at a hearing on petitioner's protest; and

(D) any other action required of petitioner.

(2) ALJ--An Administrative Law Judge employed by the State Office of Administrative Hearings.

(3) Comptroller--The Comptroller of Public Accounts and employees and designees of the Comptroller of Public Accounts.

(4) Division--The comptroller's Property Tax Assistance Division.

(5) Division director--Director of the comptroller's Property Tax Assistance Division. Except as otherwise provided in this subchapter, all petitions and other documents related to a protest shall be filed or served, as applicable, by delivery to the division director.

(6) Eligible property owner--A property owner whose property is included in the study conducted by the comptroller under Government Code, §403.302 and whose tax liability on such property is $100,000 or more. Property is "included in the study" only if, in conducting the study, the comptroller appraised or otherwise assigned a value other than local value to the property and the value of the property is reflected on the study's confidence interval detail for the school district in which the property was located. Additionally, in the case of a protest of the comptroller's findings under Government Code, §403.302(h), the property must not have been deleted from the study before final findings were certified to the commissioner of education. In the case of a protest of the comptroller's findings under Government Code, §403.302(g), the property owner's property must be included in the study for the year in which the preliminary findings were made that are the subject of the protest. In the case of a protest of the comptroller's findings under Government Code, §403.302(h), the property owner's property must have been included in the study for the year that is the subject of the audit under protest. Property is not "included in the study" in the case of a protest under Government Code, §403.302(g) or (h) by virtue of any calculations made pursuant to Government Code, §403.302(c-1), (d), (d-1), (e), (i) - (k) and a property owner does not have standing to protest such calculations.

(7) Petition--The documents and supporting evidence filed by petitioner in accordance with this subchapter to protest the comptroller's findings under Government Code, §403.302(g) or (h). A petitioner is limited to one petition per audit or property value study, except that a petitioner protesting property value study findings may file a separate petition solely to address self report corrections pursuant to §9.4305(g) of this title (relating to Who May Protest). If a petitioner files one petition to protest property value study findings and a separate petition pursuant to §9.4305(g) of this title, the petitioner may designate different agents for each protest. If a petitioner files one petition to protest both property value study findings and to address self report corrections pursuant to §9.4305(g) of this title, the petitioner may designate only one agent.

(8) Petitioner--A school district or eligible property owner who submits a petition to protest the comptroller's findings under Government Code, §403.302(g) or (h). In addition, an appraisal district may be a petitioner if it is authorized in writing by a school district to file a petition to protest and the school district is not filing a petition to protest. Unless the context clearly indicates otherwise, in this subchapter, the term "petitioner" includes petitioner's agent. When, in this subchapter, information is to be provided to or served on a petitioner, such information, except as otherwise provided in this subchapter, shall be provided to or served on the agent designated by petitioner.

(9) SOAH--The State Office of Administrative Hearings. A matter may be referred to SOAH only by the comptroller.

§9.4302. General Provisions.

(a) Scope of rules. The rules in this subchapter shall govern the procedure for protesting the comptroller's findings under Government Code, §403.302(g) or (h). The Texas Administrative Procedures Act, the Texas Rules of Procedure, and the State Office of Administrative Hearings (SOAH) procedural rules do not apply to protests of the comptroller's findings under Government Code, §403.302(g) or (h). The Texas Rules of Evidence apply to protests of the comptroller's findings under Government Code, §403.302(g) and (h) only to the extent specified in this subchapter.

(b) Construction. Unless otherwise provided, this subchapter shall be construed as provided by the Code Construction Act, Government Code, Chapter 311.

(c) Computation of time. In computing a period of time prescribed or allowed by the rules in this subchapter, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, or Texas state holiday on which the comptroller's office is closed, the period is extended to include the next day that is not a Saturday, Sunday, or Texas state holiday on which the comptroller's office is closed.

(d) Filing and serving documents. Unless otherwise provided, every document relating to a protest including, but not limited to, a petition shall be delivered to the division director by one of the following methods: hand delivery; United States Postal Service first-class mail in a properly addressed and sufficiently stamped envelope or box; overnight delivery service in a properly addressed and prepaid envelope or box; or email. The address for hand delivery is Director, Property Tax Assistance Division, 1711 San Jacinto, 3rd Floor, Austin, Texas 78701. The address for delivery by United States Postal Service mail and overnight delivery service parcels is: Director, Property Tax Assistance Division, 1711 San Jacinto, 3rd Floor, Austin, Texas 78701. The address for delivery by email is: PTADAppeals@cpa.state.tx.us. Delivery by email will only be accepted if all documents being delivered by email are forwarded in portable document format compatible with the latest version of Adobe Acrobat® or Microsoft Word® in a file size that can be accommodated by the division's computer system at the time of delivery. The petitioner is responsible for verifying receipt by the division of all documents delivered regardless of the method of delivery. All documents delivered to the division director, regardless of method of service, must be legible.

(e) Except as otherwise provided in this subchapter, the division director has independent discretion to impose deadlines and schedule hearing dates as reasonable or necessary to timely and efficiently manage the protest process.

§9.4303. Changes in Preliminary Certification of Study Findings.

(a) At any time before the date on which final changes in the preliminary findings under Government Code, §403.302(g) are certified to the commissioner of education, the comptroller may certify to the commissioner of education amended preliminary findings.

(b) An amended preliminary finding is a change made by the comptroller to a school district's preliminary findings that is certified to the commissioner of education after the date on which preliminary findings for the school district were originally certified and before the date on which final certification of changes in preliminary findings are certified.

(c) If the comptroller certifies amended preliminary findings for a school district for which the comptroller's determination initially certified to the commissioner of education reflected valid local value

pursuant to Government Code, §403.302(c) and the amended preliminary findings result in a determination that the school district's local value is invalid pursuant to Government Code, §403.302(c), the affected school district and eligible property owners to whose property the amended preliminary findings pertain have a right to protest the findings in the manner required by this subchapter. A petition protesting the comptroller's amended preliminary findings pursuant to this section must be filed within 40 calendar days after the date the comptroller certifies the amended preliminary findings to the commissioner of education. In addition to the restrictions stated in this subsection, all provisions in this subchapter relating to standing apply to protests of amended preliminary findings.

§9.4304. Extensions of Time.

(a) Before a referral to the State Office of Administrative Hearings (SOAH), the division director, at the director's independent initiative and discretion, may grant a petitioner an extension of time for the limited purpose of correcting technical errors or omissions in a timely filed protest petition. Petitioner's failure to submit grounds for objection or supporting evidence as required by this subchapter is not a technical error or omission.

(b) At any time before a referral to SOAH, a petitioner may request an extension of time for any deadline, except the deadline to file a protest, by submitting a request for extension to the division director.

(c) An extension of time shall be requested in writing and be submitted to and received by the division director at least five business days in advance of the original deadline for which the extension is requested. If requested in writing by the petitioner and for good cause shown, the division director may waive the requirement that the request for the extension be made five calendar days in advance of the deadline.

(d) An extension may not extend the deadline for more than ten calendar days.

(e) An extension may be granted by the division director only for good cause shown, and if the reason for the extension is not the petitioner's neglect, indifference, or lack of diligence. Good cause does not include a claim that the time periods established in this subchapter are too short to meet the deadline.

(f) No extension may be granted to extend the deadline to file a protest.

§9.4305. Who May Protest.

(a) A school district may protest the comptroller's preliminary findings under Government Code, §403.302(g).

(b) A school district may protest the comptroller's findings under Government Code, §403.302(h) that constitute either revisions to the study findings under Government Code, §403.302(g) or denial of revisions to the study findings under Government Code, §403.302(g) that were specifically requested in the request for audit.

(c) An eligible property owner in a school district may protest the comptroller's preliminary findings under Government Code, §403.302(g) regarding the taxable value of the owner's property.

(d) An eligible property owner in a school district may protest the comptroller's findings under Government Code, §403.302(h) regarding the taxable value of the owner's property if the study findings regarding the owner's property under Government Code, §403.302(g) were revised as a result of the audit.

(e) An appraisal district may not protest unless authorized to do so in writing by a school district for which the appraisal district appraises property and the school district is not filing a protest; however, a chief appraiser or other employee of an appraisal district may be designated as an agent by a school district in a school district's protest. An appraisal district that is authorized by a school district to file a protest is limited to protesting the comptroller's findings in the school district that authorized the protest. An appraisal district may not protest the comptroller's appraisal district findings under Tax Code, §5.10.

(f) A protest filed by a property owner will not be considered for any purposes to be a protest filed by a school district.

(g) Self-report corrections. A school district, or an appraisal district acting under authority of a school district as provided under subsection (e) of this section, may seek correction of an error in the comptroller's preliminary findings under Government Code, §403.302(g) that was caused by an error in a district's annual report of property value or by a change in a district's certified tax roll by timely filing a petition and otherwise complying with the requirements of this subchapter.

(h) No protest of the comptroller's preliminary findings under Government Code, §403.302(g) other than self-report corrections may be filed by any party in a school district in a year in which no study is conducted pursuant to Government Code, §403.302.

§9.4306. Filing a Protest.

(a) A protest shall be asserted by timely filing a petition with the division. A petition protesting the comptroller's preliminary findings under Government Code, §403.302(g) must be filed within 40 calendar days after the date the comptroller certifies preliminary findings of taxable value to the commissioner of education pursuant to Government Code, §403.302(g). A petition seeking a self-report correction pursuant to §9.4305(g) of this title (relating to Who May Protest) must be filed within 40 calendar days after the date the comptroller certifies preliminary findings of taxable value to the commissioner of education pursuant to Government Code, §403.302(g). A petition protesting the comptroller's findings under Government Code, §403.302(h) must be filed within 40 calendar days after the date the comptroller certifies findings of the audit to the commissioner of education pursuant to Government Code, §403.302(h).

(b) A petition must be signed by:

(1) the superintendent of the school district and the school district's designated agent, if it is a petition filed by a school district;

(2) the superintendent of the school district and the chief appraiser of the appraisal district, if it is a petition filed by an appraisal district authorized by a school district; or

(3) the property owner and the property owner's agent, if it is a petition filed by a property owner.

(c) All petitions shall be filed with the division director in the form and manner prescribed by the comptroller. A petition may be delivered to the division director by hand delivery, mail, overnight delivery service, or email in accordance with the provisions of §9.4302(d) of this title (relating to General Provisions), but a petition is not filed until it is actually received by the division director. For purposes of this subsection, receipt by the division constitutes receipt by the division director. The petitioner is responsible for verifying receipt by the division of all documents delivered regardless of the method of delivery. A petitioner shall have the burden to prove that a petition was timely filed.

(d) A petition delivered to the division director by hand delivery or email is timely filed only if it is received on or before the last day for filing as set forth in subsection (a) of this section and meets the requirements set forth in §9.4302(d) of this title.

(e) A petition delivered to the division director by mail is timely filed only if it is received on or before the last day for filing as set forth in subsection (a) of this section or if it is received within ten calendar days of the day it is sent and it is sent by United States Postal Service first-class mail in a properly addressed and sufficiently stamped envelope or box and the envelope or box exhibits a legible postmark affixed by the United States Postal Service showing that the petition was mailed on or before the last day for filing as set forth in subsection (a) of this section.

(f) A petition delivered to the division director by overnight delivery service is timely filed only if it is received on or before the last day for filing as set forth in subsection (a) of this section or if it is received within ten calendar days of the day it is sent and it is sent by overnight delivery service in a properly addressed and prepaid envelope or box and the envelope or box exhibits a legible date showing that the petition was delivered to the overnight delivery service for delivery on or before the last day for filing.

(g) A school district shall deliver a copy of its petition, except supporting documentary evidence, to each appraisal district that appraises property for the district. An appraisal district authorized by a school district to file a protest shall deliver a copy of its petition, except supporting documentary evidence, to the school district that authorized the protest. A property owner shall deliver a copy of its petition, including supporting documentary evidence, to each school district and appraisal district in which the property under protest is located. Every petition shall contain a certification that a copy of the petition was delivered as required by this subsection.

(h) The petition, including supporting documentary evidence, if filed by mail or overnight delivery service, must be filed in triplicate with the division director and the original and both copies must be in the form required under this subchapter. If filed by email, only the original must be filed; no additional copies are required.

§9.4307. Dismissal.

(a) A petition is subject to dismissal if there is any jurisdictional defect. Jurisdictional defects include, but are not limited to, lack of standing and untimely filing. If a petition is filed and there is a jurisdictional defect, the division may file a motion to dismiss with the State Office of Administrative Hearings (SOAH) and a request to docket. Following receipt of the referral, SOAH shall assign the case a docket number and assign an Administrative Law Judge (ALJ). At the time of filing the motion to dismiss, the division will deliver a copy to petitioner by United States Postal Service First Class Mail and, if an email address has been provided in the petition, by email. The petitioner may, no later than seven calendar days from the date the motion to dismiss is filed, file a response with SOAH. At the time of filing a response, the petitioner shall deliver a copy of the response to the division director and counsel for the division by United States Postal Service First Class Mail and email. The division will have seven calendar days from the date of filing of the response to file a reply with SOAH. At the time of filing a reply, a copy shall be delivered to petitioner by United States Postal Service First Class Mail and, if an email address has been provided in the petition, by email. After time for the division to file a reply has expired, SOAH shall consider the motion, any timely-filed response, and any timely-filed reply, and issue a proposed final decision within seven business days to the deputy comptroller stating the ALJ's recommendation as to the decision on the motion. Neither the division nor the petitioner shall be permitted to submit any additional information or evidence for consideration by the ALJ. No oral hearing will be held.

(b) The ALJ's proposal for decision shall include the ALJ's recommendation for final decision and the rationale supporting such recommendation.

(c) The ALJ shall serve the proposal for decision on the deputy comptroller, the petitioner, and the division director by facsimile, electronic mail, hand delivery, or overnight mail delivery service. An ALJ will forward a copy of the record to the deputy comptroller with any proposal for decision.

(d) A party to the protest that is adversely affected by the proposal for decision may, within five calendar days after the date the proposed decision is sent by facsimile, electronic mail, hand delivery or is delivered to an overnight delivery service, file with the deputy comptroller exceptions to the proposal for decision. Exceptions filed pursuant to this subsection shall be filed with the comptroller's Special Counsel for Tax Hearings by facsimile or hand delivery and shall on the same date be served on all other parties to the protest by facsimile, hand delivery, or email. If exceptions are filed, all other parties may, within five calendar days after the date the exceptions are filed, file replies to the exceptions. Replies filed pursuant to this subsection shall be filed with the comptroller's Special Counsel for Tax Hearings by facsimile or hand delivery and shall on the same date be served on all other parties to the protest by facsimile, hand delivery or email.

(e) The deputy comptroller shall issue a final order and, in doing so, may adopt, amend, or reject the ALJ's proposal for decision.

(f) A decision is final on the date signed by the deputy comptroller.

(g) The deputy comptroller shall deliver written notice of the final decision to each party to the protest.

(h) Petitioner bears the burden of proof on all jurisdictional matters.

(i) If a motion to dismiss is denied, the petition will be processed in accordance with this subchapter.

§9.4308. Contents of Petition.

(a) A petition shall show the petitioner's name and address; designate the petitioner's agent; designate the mailing address, delivery address for overnight delivery, e-mail address, and facsimile number for purposes of service and notice under this subchapter; and, state the grounds for objection to the preliminary findings. Petitioner shall state the grounds for objection and provide supporting documentary evidence in the manner required by this section. The petition shall include the following information:

(1) the petitioner's grounds for objection, stated with the specificity and in the manner required by this subchapter; and

(2) documentary evidence, organized as required by this subchapter, to support each contention asserted in the petition.

(b) To provide the comptroller with sufficient notice of grounds for objection, the petitioner shall:

(1) except in the case of a self-report correction which shall be identified as Category "SR," identify and numerically list each property by each property category; each property identification number or, in the case of property in Category J, each company identification number or, in the case of property in Category D1, each land class and item of income or expense; and, each finding alleged to be inaccurate;

(2) identify, for each change sought by way of the protest, the inaccuracy of the finding;

(3) identify, for each change sought by way of the protest, the finding alleged by petitioner to be accurate including, if applicable as set forth in subsection (d) of this section, the value of the change sought;

(4) identify, for each change sought by way of the protest, the basis for petitioner's assertion that the comptroller's finding is inaccurate; and

(5) identify by title or description and provide, for each change sought by way of the protest, some documentary evidence that supports each of petitioner's allegations of inaccuracy. Documentary evidence that merely relates to the finding at issue is insufficient. The documentary evidence must actually support, although need not conclusively establish, the petitioner's contention that the comptroller's finding is inaccurate. If, as to a ground of objection, the division's documents created, collected, and utilized in the conduct of the study or performance of the audit, as applicable, evidence petitioner's allegations of inaccuracy, it is sufficient to include those documents in support of the ground of objection so long as the documents support petitioner's allegations of inaccuracy with specificity.

(c) The petition is required to identify separately each finding alleged to be inaccurate. If, for example, it is alleged that the effective age and the land value for a specific finding are inaccurate, each issue must be identified as a separate ground for objection. Matters such as calculation of local modifiers, land schedules, and stratification do not constitute comptroller findings, but may be used in arriving at comptroller findings. Such matters may be raised in a protest only in support of individual claims of inaccurate findings. An objection that does not constitute a protest of a comptroller finding is prohibited. For example, to object to a land value of any or all properties included in the study or a land schedule used in the study, each property for which a value change is sought must be separately identified. A protest of an appraiser's land schedule generally and without identifying each property for which a value change is sought does not constitute a protest of a comptroller finding and shall not be permitted.

(d) Each ground for objection included in the petition must state the relief sought with sufficient specificity such that the comptroller or an ALJ can, based solely on a review of the petition, grant the relief requested by making the change requested. Thus, for grounds for objection for which a specific value adjustment is sought, the specific value sought must be stated. For example, the value of personal property for which a sale adjustment is sought must be stated and the price per acre sought for a protested item of productivity value income or expense must be stated. A petitioner is not required to include a specific value for changes that are not value specific. For example, an adjustment to effective age does not require a statement of value because the relief can be granted without reference to the value change resulting from a change in effective age. If a value-specific adjustment is requested but no specific value is identified, the division may make a value adjustment in response and the value adjustment made will constitute agreement as to the ground for objection.

(e) All documentary evidence submitted by petitioner with the petition shall be filed in the following manner: organized and separated by cover sheets to correspond to each ground for objection, with each cover sheet clearly identifying the ground for objection number, category, and property identification number, company identification number, or land class and item of income or expense, as applicable.

(f) The following are examples of sufficient identification of grounds for objection in protesting the comptroller's preliminary findings under Government Code, §403.302(g). The examples are general and provided only by way of example. All requirements for submission set forth in this subchapter must be followed.
Figure: 34 TAC §9.4308(f)

(g) The petition must contain a statement by the school district's or authorized appraisal district's agent or, if no agent has been designated, by the school district superintendent or, as applicable, the chief appraiser for the authorized appraisal district that, to the best of the person's knowledge, the statements contained in the petition and the evidence attached to the petition are true and correct.

§9.4309. Insufficient Grounds for Objection.

(a) Any petition or ground for objection that does not comply with §9.4308 of this title (relating to Contents of Petition) does not adequately specify the grounds for objection as required by Government Code, §403.303(a) and may be rejected by the division director without further review by the division.

(b) If the division director determines that a petition or ground for objection asserted in a petition does not comply with §9.4308 of this title the division will notify the petitioner that the petition or ground for objection has been rejected pursuant to this section. No additional information or evidence may be submitted by a petitioner after a determination of rejection has been made by the division director. Grounds for objection, if any, that have not been rejected will be processed as otherwise set forth in this subchapter.

(c) If a petition is rejected in its entirety as set forth in this section, the petitioner may request referral of the rejection to State Office of Administrative Hearings (SOAH) within seven calendar days of the date that the division sends petitioner notice of the rejection. Upon timely written request to the division, a copy of the petition will be referred to SOAH with notice that the petition has been rejected pursuant to this subchapter and a request to docket. Following receipt of the referral, SOAH shall assign the case a docket number and assign an Administrative Law Judge (ALJ). The petitioner shall not be permitted to submit any additional information or evidence for consideration by the ALJ. No oral hearing will be held. The ALJ shall consider the petition and make a determination as to each ground for objection included in the petition as to whether or not such ground for objection complies with §9.4308 of this title. If the ALJ determines that a ground for objection does not comply with §9.4308 of this title, the ALJ shall, within ten business days after referral, issue a proposal for decision to the deputy comptroller that the ground for objection be rejected. If the ALJ determines that a ground for objection does comply with §9.4308 of this title, the ALJ shall, within ten business days after referral, issue a proposal for decision to the deputy comptroller stating the ALJ's recommendation as to the decision on such ground for objection. The decision must specify the specific change to the study findings the ALJ recommends and the change must be based solely on the ground for objection set forth in the petition. A ground for objection that does not comply with §9.4308 of this title will not provide the ALJ with sufficient information to identify a specific change to the study findings. An ALJ will forward a copy of the record to the deputy comptroller with any proposal for decision. After receiving the ALJ's proposal for decision and the record, the deputy comptroller shall issue a final decision.

(d) An ALJ's proposal for decision issued pursuant to subsection (c) of this section shall include the ALJ's recommendations for final decision and the rationale supporting such recommendations.

(e) The ALJ shall serve a proposal for decision issued pursuant to subsection (c) of this section on the deputy comptroller, the petitioner, and the division director by facsimile, electronic mail, hand delivery, or overnight mail delivery service. An ALJ will forward a copy of the record to the deputy comptroller with any proposal for decision.

(f) A party to the protest that is adversely affected by a proposal for decision issued pursuant to subsection (c) of this section may, within five calendar days after the date the proposed decision is sent by facsimile, electronic mail, hand delivery or is delivered to an overnight delivery service, file with the deputy comptroller exceptions to the proposal for decision. Exceptions filed pursuant to this subsection shall be filed with the comptroller's Special Counsel for Tax Hearings by fac-

simile or hand delivery and shall on the same date be served on all other parties to the protest by facsimile, hand delivery, or email. If exceptions are filed, all other parties may, within five calendar days after the date the exceptions are filed, file replies to the exceptions. Replies filed pursuant to this subsection shall be filed with the comptroller's Special Counsel for Tax Hearings by facsimile or hand delivery and shall on the same date be served on all other parties to the protest by facsimile, hand delivery or email.

(g) The deputy comptroller shall issue a final order on a proposal for decision issued pursuant to subsection (c) of this section and, in doing so, may adopt, amend, or reject the ALJ's proposal for decision. A decision is final on the date signed by the deputy comptroller. The deputy comptroller shall deliver written notice of the final decision to each party to the protest.

(h) If one or more, but not all, of the grounds for objection included in a petition are rejected as set forth in this section, the grounds for objection that have not been rejected will be processed as set forth in this subchapter. After the parties have completed the prehearing stages of review, recommendation, submission of evidence, and informal conference on the grounds for objection that have not been rejected and the petitioner has the opportunity to request referral to SOAH, petitioner may, at the same time and in the same manner as grounds for objection that have not been rejected, request referral to SOAH of rejected grounds for objection. The request for referral to SOAH of rejected grounds for objection must be included in petitioner's request for referral to SOAH of grounds for objection that were not rejected. As to grounds for objection that have been rejected, the provisions of subsections (c) - (g) of this section will control. As to grounds for objection that have not been rejected, the remaining provisions of this subchapter will control.

§9.4310. Study and Audit Documents.

(a) The documents created, obtained, and utilized by the division in conducting the study or performing the audit, as applicable, are considered the initial evidence in a protest of the comptroller's findings under Government Code, §403.302(g) or (h). Except as provided in subsection (b) of this section, all such documents are deemed admissible evidence for purposes of any hearing referred to the State Office of Administrative Hearings (SOAH) under this subchapter.

(b) Any documents created, obtained, and utilized by the division in conducting the study or performing the audit, as applicable, that are not made available in response to a proper request in accordance with the Texas Public Information Act are deemed, as to the division, inadmissible for purposes of any hearing referred to SOAH under this subchapter. This subsection does not restrict a petitioner's right to file such documents in support of a ground of objection as provided under this subchapter. If a petitioner does elect to file such documents, the documents will be deemed admissible evidence on each ground of protest in support of which the documents are filed for purposes of any hearing referred to SOAH under this subchapter.

(c) Any claim by a petitioner that documents created, obtained, or utilized by the division in conducting the study or performing the audit, as applicable, were not made available in response to a proper request in accordance with the Texas Public Information Act shall be made by written notice to the division director within seven calendar days of delivery by the division of such documents pursuant to §9.4311(c) of this title (relating to Prehearing Exchange and Informal Conference). Petitioner's notice must include a copy of petitioner's request for documents, any response received from the division, and identification of the specific documents petitioner claims were not made available. If petitioner fails to timely provide such written notice to the division director, the claim shall be deemed waived for purposes of the protest.

(d) After receipt of timely written notice under subsection (c) of this section and consideration of petitioner's claim, the division director shall deliver to petitioner written notice as to whether or not the documents at issue will be withdrawn as evidence. If the documents at issue are not withdrawn as evidence, the matter will be determined at the SOAH hearing, if any, on the ground of protest at issue. The division director's notice will include all documentary evidence that the division will introduce and identification of all witnesses who may testify at the time of the SOAH hearing, if any, relating to petitioner's claim under subsection (c) of this section. The petitioner shall, within five calendar days of delivery of the division director's notice, deliver to the division director all documentary evidence that the petitioner will introduce and identification of all witnesses who may testify at the time of the hearing, if any, relating to petitioner's claim under subsection (c) of this section. At any SOAH hearing on petitioner's claim, both parties shall be limited to the documentary evidence delivered and witnesses disclosed under this subsection.

(e) SOAH shall have jurisdiction to determine a petitioner's claim asserted under subsection (c) of this section only if the ground of protest for which the documents at issue were submitted is referred to SOAH as otherwise provided under this subchapter. The Administrative Law Judge's (ALJ's) determination shall be limited to whether or not the documents at issue are admissible.

§9.4311. Prehearing Exchange and Informal Conference.

(a) After reviewing a petition, the division will send petitioner responses to the petitioner's relief requested in its grounds for objection. The division's responses may include rejection as set forth in this subchapter, agreement, disagreement, or modification. No response to a rejection shall be permitted. An agreement as to a ground for objection is deemed final resolution as to the ground for objection to which the division granted the requested relief.

(b) Petitioner will be given a reasonable period of time, but no less than 15 calendar days to accept the division's recommendations and waive any further consideration of the petition or to reply to the division's responses of disagreement and modification. A petitioner that does not accept the division's recommendations and waive further consideration of the petition shall reply advising the division, as to each ground for objection to which the division has responded with disagreement or modification, as to petitioner's agreement or disagreement. For each ground for objection as to which petitioner does not agree with the division's recommendation, petitioner must file with the division director all supplemental evidence supporting the ground for objection and provide the identity and resume or summary of qualifications of each witness, other than the chief appraiser or other employees of the appraisal district that appraises property for the protesting school district, who may testify at any hearing on the ground for objection. Such testifying witnesses shall be identified in a list, identifying for each on which grounds for objection the witness may testify, and a current resume, curriculum vitae, or summary of qualifications and identification of relevant certifications and licenses shall be provided for each witness. No witness identification is required for the chief appraiser or other employees of the appraisal district that appraises property for the protesting school district. The method of delivery, timeliness of filing, and number of copies required of the supplemental supporting evidence and witness disclosure shall be governed in accordance with the provisions of §9.4306 of this title (relating to Filing a Protest). All documentary evidence shall be filed in the following manner: organized and separated by cover sheets to correspond to each ground for objection, with each cover sheet clearly identifying the ground for objection number, category, and property identification number, company identification number, or land class and item of income or expense, as applicable.

(c) Within 15 calendar days after receipt of petitioner's reply and evidence, the division shall deliver to petitioner a copy of the documents created, collected, and utilized in conducting the study or performing the audit, as applicable, that the division plans to introduce as evidence relating to the grounds for objection and all rebuttal evidence regarding each ground for objection to which petitioner did not agree and provide the identity and resume or summary of qualifications of each witness, other than comptroller employees, who may testify at any hearing on the ground for objection. Such testifying witnesses shall be identified in a list, identifying for each on which grounds for objection the witness may testify, and a current resume, curriculum vitae, or summary of qualifications and identification of relevant certifications and licenses shall be provided for each witness. No witness identification is required for comptroller employees. All documentary evidence shall be filed in the following manner: organized and separated by cover sheets to correspond to each ground for objection, with each cover sheet clearly identifying the ground for objection number, category, and property identification number, company identification number, or land class and item of income or expense, as applicable.

(d) At or after the time that the division delivers its evidence to petitioner pursuant to subsection (c) of this section, the division will provide the petitioner with revised recommendations, if any, and notice of the date, time, and place of the informal conference to be held for consideration of petitioner's remaining grounds for objection, if any. A petitioner may accept the division's recommendations of disagreement or modification made to that point and waive further consideration of the petition or appear at the informal conference. Participation in the informal conference is a jurisdictional prerequisite to referral of grounds for objection to the State Office of Administrative Hearings (SOAH) for hearing. Failure to appear at the scheduled informal conference will be deemed acceptance by the petitioner of the division's recommendations and waiver by the petitioner of further consideration of petitioner's protest. Notice under this subsection will be made by one of the following methods: U.S. first class mail, facsimile transmission, or e-mail.

(e) If the division has identified any failure of petitioner to properly comply with the requirements of labeling and organizing evidence, at the time of the informal conference the petitioner will be notified of such failure and given the opportunity to correct such failure through identification of evidence that was intended to correspond to grounds for objection that remain subject to referral to SOAH. This subsection does not apply to grounds for objection that have been rejected, grounds for objection that have been deemed resolved by agreement of the division, or grounds for objection that have been resolved by agreement of the petitioner. This subsection does not permit a petitioner to submit any additional information, documentation, or evidence. If a petitioner, in correcting a failure to properly comply with the requirements of labeling and organizing evidence, reorganizes the evidence in such a manner as to include evidence under a ground of objection other than the ground of objection understood by the division to be the ground of objection to which the evidence related when originally submitted and the matter is referred to SOAH, the division may submit additional rebuttal evidence, if necessary, upon referral to SOAH.

(f) If a petitioner and the division are unable to resolve all of the remaining grounds for objection timely raised in a petitioner's protest through the informal settlement conference, the petitioner may request a hearing before a SOAH Administrative Law Judge (ALJ).

(g) A petitioner's request for a hearing before a SOAH ALJ shall be made by filing a written request with the division director no later than seven calendar days after the informal conference and must specifically identify all grounds for objection for which referral is requested and identify the individual(s) who will present argument and introduce evidence for petitioner at SOAH if a referral to SOAH is made.

§9.4312. Scheduling a Protest Hearing.

(a) Referral of any matter to the State Office of Administrative Hearings (SOAH) may be made only by the division. A referral made pursuant a request under §9.4311 of this title (relating to Prehearing Exchange and Informal Conference) of grounds for objection raised in a petition is initiated by filing with SOAH a request to docket that requests that the hearing be conducted on a date certain. At the time a referral made pursuant to a request under §9.4311 of this title is initiated, the division shall also provide to SOAH:

(1) a list of the grounds for objection being referred;

(2) a copy of the documents delivered by the division pursuant to §9.4311(c) of this title, created, collected, and utilized in the conduct of the study or performance of the audit, as applicable, relating to the grounds for objection being referred;

(3) a copy of the portions of the petition relating to the grounds for objection being referred, including documentary evidence submitted with the petition in support of the grounds for objection being referred;

(4) a copy of any supplemental documentary evidence, witness identification, and resumes, curricula vitae, and summaries of qualifications timely submitted by petitioner pursuant to §9.4311 of this title relating to the grounds for objection being referred;

(5) a copy of any rebuttal documentary evidence, witness identification, and resumes, curricula vitae, and summaries of qualifications timely delivered by the division pursuant to §9.4311 of this title relating to the grounds for objection being referred. The division shall also provide rebuttal evidence, if any, pursuant to §9.4311(e) of this title;

(6) if the referral to SOAH includes grounds for objection in protesting the comptroller's preliminary findings under Government Code, §403.302(g), a copy of the applicable International Association of Assessing Officers (IAAO) Standard on Ratio Studies; and

(7) if the referral to SOAH includes grounds for objection in protesting the comptroller's preliminary findings under Government Code, §403.302(g), a copy of the comptroller's written procedures, if any, including the field appraisers' procedures manual, for conducting the property value study at issue, if applicable to the grounds for objection referred.

(b) The documents submitted pursuant to subsection (a)(1) - (7) of this section will be submitted in an organized manner to facilitate reference to such documents by the Administrative Law Judge (ALJ).

(c) At the discretion of the division director, matters referred to SOAH pursuant to this section may be joined for purposes of hearing.

(d) Following receipt of the request to docket pursuant to this section, SOAH shall assign the case a docket number; assign an ALJ; schedule the protest for hearing to be held not later than 30 calendar days after the date of the referral; and, no later than 20 calendar days prior to the hearing, deliver written notice of the hearing date, time, and location of the hearing to the comptroller's representative identified in the request to docket.

(e) Hearings scheduled pursuant to this section shall be held at a location designated by SOAH.

(f) Following receipt of the written notice of the hearing date, time, and location from SOAH pursuant to this section, the division shall deliver to petitioner notice of the date, time, and place fixed for a hearing and a copy of all documents that were submitted to SOAH

pursuant to subsection (a) of this section. Such notice and copies of documents submitted to SOAH must be delivered, unless otherwise agreed by the parties, not later than ten calendar days before the date of the hearing. Notice under this subsection will be made by one of the following methods: U.S. first class mail, facsimile transmission, or e-mail.

§9.4313. Conduct of Oral Hearing.

(a) Except as otherwise provided in this subchapter, the Administrative Law Judge (ALJ) shall convene a hearing for a protest.

(b) All oral hearings under this subchapter shall be recorded. A petitioner will be provided a copy of the recording after a written request and payment of a cost-based fee. A petitioner may at any time make arrangements for and bear the cost of having a hearing recorded and transcribed by a court reporter, provided the comptroller timely receives a copy of the transcript at petitioner's expense.

(c) Oral hearings are generally open to the public and shall be held in Austin. However, the ALJ shall close a hearing, on the ALJ's own motion or on the motion of any party or if directed by the comptroller, if confidential information may be disclosed during the hearing.

(d) Hearings shall be conducted in accordance with this subchapter. The Texas Administrative Procedures Act, the Texas Rules of Procedure, and the State Office of Administrative Hearings (SOAH) procedural rules do not apply. The Texas Rules of Evidence apply only to the extent specified in this subchapter.

(e) Except as otherwise provided by this subchapter, the comptroller shall present its evidence and argument prior to each petitioner. After each petitioner has presented its evidence and argument, the comptroller shall be given the opportunity to present rebuttal evidence and argument. With that limitation, the ALJ shall establish the order of proceeding and is responsible for closing the record.

(f) No party may offer documentary evidence at the hearing that was not filed and served in accordance with the requirements of this subchapter except upon a showing of good cause for the failure to comply. Upon a party's request supported by a showing of good cause, the ALJ may admit such evidence. No evidence may be submitted to SOAH on any ground of protest other than the grounds for objection identified and submitted by the comptroller.

(g) Testimony of witnesses shall be confined to documentary evidence that has been timely submitted pursuant to the terms of this subchapter. The testimony of a witness may provide, subject to proper objections, background regarding, governing law or standards relating to, or explanation of the documentary evidence, but shall not introduce facts that are not reflected in the documentary evidence.

(h) The following individuals are deemed qualified to testify in a hearing before SOAH conducted pursuant to this subchapter: comptroller employees, chief appraisers, and individuals registered as Class IV Appraisers with the Texas Department of Licensing and Regulation. Any asserted challenge to such individuals may be considered by the ALJ in considering the weight and credibility of testimony, but shall not be grounds for exclusion. All other individuals are subject to challenge and exclusion in accordance with the Texas Rules of Evidence and applicable case law.

(i) Argument shall be confined to the evidence and to arguments of other parties.

(j) Admissions, proposals, offers, or agreements made or reached in the compromise of disputed issues prior to referral to SOAH may not be admitted in a hearing. Admissions, proposals, offers, or agreements made or reached in the compromise of disputed issues regarding other protests or prior study years may not be admitted in a hearing.

(k) Unless permitted by the ALJ, no more than two representatives for each party or aligned group of parties shall present argument and introduce evidence at a hearing.

(l) Except as otherwise provided in this subchapter, the ALJ shall establish the order of proceeding and is responsible for closing the record.

(m) An attorney who appears at a protest hearing to argue and present evidence on behalf of a petitioner shall not testify at the hearing.

§9.4314. Administrative Law Judge's Powers.

(a) The Administrative Law Judge (ALJ) shall conduct a protest hearing in a manner insuring fairness, the reliability of evidence, and the timely completion of the hearing. The ALJ shall have the authority necessary to receive and consider evidence as provided under this subchapter and propose decisions only on the issues referred by the comptroller.

(b) The comptroller has the burden to prove the accuracy of comptroller's findings under Government Code, §403.302(g) or (h).

(c) The ALJ's authority includes, but is not limited to, the following:

(1) rule on motions and the admissibility of evidence;

(2) join related protests for hearing;

(3) conduct a single hearing that provides for:

(A) participation by the affected school district(s) and any eligible property owner that has filed a valid and timely petition, if the hearing concerns the comptroller's preliminary findings under Government Code, §403.302(g); or

(B) participation by the affected school district(s) and the commissioner of education, if the hearing concerns the findings of an audit of a school district's taxable property value conducted pursuant to Government Code, §403.302(h);

(4) conduct oral hearings in an orderly manner and expel from any proceeding any individuals who, after an appropriate warning, fail to comport themselves in a manner befitting the proceeding and continue with the proceeding, hear evidence, and render a decision on the protest;

(5) administer oaths to all persons presenting testimony;

(6) examine witnesses and comment on the evidence;

(7) ensure that evidence, argument, and testimony are introduced and presented expeditiously;

(8) refuse to hear arguments that are repetitious, not confined to issues referred to State Office of Administrative Hearings (SOAH) by the comptroller pursuant to this subchapter, not related to the evidence, or that constitute mere personal criticism;

(9) accept and note any petitioner's waiver of any right granted by this subchapter;

(10) limit each oral hearing to two hours for presentation of evidence and argument or extend the two-hour time limit in the interest of a full and fair hearing; and

(11) exercise any other powers necessary or convenient to carry out the ALJ's responsibilities and to ensure timely certification of changes in preliminary findings to the commissioner of education.

(d) The ALJ shall take official notice of the policies and procedures of the comptroller pertaining to the ratio study.

(e) The ALJ may entertain motions for dismissal at any time as requested by the comptroller. Grounds for dismissal shall include, but are not limited to, the following:

(1) failure to prosecute;

(2) unnecessary duplication of proceedings or res judicata;

(3) withdrawal of protest;

(4) moot questions or obsolete petition; or

(5) the comptroller has certified amended preliminary findings pursuant to this subchapter.

(f) The ALJ may grant a request to postpone an oral protest hearing if good cause is shown and doing so would not prevent timely certification of changes in preliminary findings to the commissioner of education. A request to postpone must be in writing, show good cause for the postponement, and be delivered five calendar days before the date the protest hearing is scheduled to begin. Good cause does not include a claim that the time periods established in this subchapter are too short to meet the deadline. If requested in writing by the petitioner and for good cause shown, the ALJ may waive the requirement that the request for postponement be made five calendar days in advance of the deadline.

(g) Except as otherwise provided in this subchapter, the ALJ in a protest may not communicate outside a protest hearing, directly or indirectly, with any agency, person, petitioner, or petitioner's agent regarding any issue of fact or law relating to the protest unless all parties in the protest have notice and opportunity to participate.

§9.4315. Proposal for Decision After Oral Hearing.

(a) The Administrative Law Judge (ALJ) shall prepare a proposal for decision that includes the ALJ's recommendations for final decision and the rationale supporting such recommendations.

(b) The ALJ shall serve the proposal for decision on the deputy comptroller, the petitioner, and the division director by facsimile, electronic mail, hand delivery, or overnight mail delivery service. An ALJ will forward a copy of the record to the deputy comptroller with any proposal for decision.

(c) A party to the protest that is adversely affected by the proposal for decision may, within five calendar days after the date the proposed decision is sent by facsimile, electronic mail, hand delivery or is delivered to an overnight delivery service, file with the deputy comptroller exceptions to the proposal for decision. Exceptions filed pursuant to this subsection shall be filed with the comptroller's Special Counsel for Tax Hearings by facsimile or hand delivery and shall on the same date be served on all other parties to the protest by facsimile, hand delivery, or email. If exceptions are filed, all other parties may, within five calendar days after the date the exceptions are filed, file replies to the exceptions. Replies filed pursuant to this subsection shall be filed with the comptroller's Special Counsel for Tax Hearings by facsimile or hand delivery and shall on the same date be served on all other parties to the protest by facsimile, hand delivery or email.

§9.4316. Final Decision After Oral Hearing.

(a) The deputy comptroller shall issue a final order and, in doing so, may adopt, amend, or reject the Administrative Law Judge's (ALJ's) proposal for decision.

(b) A decision is final on the date signed by the deputy comptroller.

(c) The deputy comptroller shall deliver written notice of the final decision to each party to the protest.

§9.4317. Effect of Final Decision and Certification of Changes.

(a) A final decision ordering changes to findings made as a result of a school district's protest will change Government Code, §403.302 findings for the school district and Tax Code, §5.10 findings for all appraisal districts in which the school district is located.

(b) A final decision ordering changes to findings made as a result of a property owner's protest will change Government Code, §403.302 findings for the school district(s) in which the property that is the subject of the protest is located and Tax Code, §5.10 findings for the appraisal district(s) in which the property that is the subject of the protest is located.

(c) Certification of changes to preliminary findings. Unless the comptroller determines that circumstances require otherwise, the comptroller shall certify to the commissioner of education all changes to Government Code, §403.302(g) preliminary findings on or before August 15 of the year following the year of the study.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 4, 2010.

TRD-201006256
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: December 19, 2010
For further information, please call: (512) 475-0387

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS

SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §1.5

The Texas Board of Architectural Examiners withdraws the proposed amendment to §1.5 which appeared in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6890).

Filed with the Office of the Secretary of State on November 8, 2010.

TRD-201006392
Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Effective date: November 8, 2010
For further information, please call: (512) 305-9040

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 34. STATE FIRE MARSHAL

SUBCHAPTER H. STORAGE AND SALE OF FIREWORKS

28 TAC §§34.813, 34.814, 34.831

Proposed amended §§34.813, 34.814, 34.831, published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3428), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on November 2, 2010.

TRD-201006214

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 106. PERMITS BY RULE

SUBCHAPTER A. GENERAL REQUIREMENTS

30 TAC §106.4

Proposed amended §106.4, published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3443), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on November 2, 2010.

TRD-201006215

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.110

Proposed amended §116.110, published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3447), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on November 2, 2010.

TRD-201006216

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SUBCHAPTER F. STANDARD PERMITS

30 TAC §116.610

Proposed amended §116.610, published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3447), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on November 2, 2010.

TRD-201006217

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

SUBCHAPTER E. CHILD/CAREGIVER RATIOS AND GROUP SIZES

DIVISION 2. CLASSROOM RATIOS AND GROUP SIZES FOR CENTERS LICENSED TO CARE FOR 13 OR MORE CHILDREN

40 TAC §§746.1601, 746.1609, 746.1617

The Department of Family and Protective Services withdraws the proposed amendments to §746.1601 and §746.1609 and new §746.1617 which appeared in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4909).

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006268
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: November 5, 2010
For further information, please call: (512) 438-3437

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DIVISION 4. RATIOS FOR FIELD TRIPS

40 TAC §746.1803

The Department of Family and Protective Services withdraws the proposed new §746.1803 which appeared in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4909).

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006269
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: November 5, 2010
For further information, please call: (512) 438-3437

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DIVISION 7. RATIOS FOR WATER ACTIVITIES

40 TAC §746.2101, §746.2103

The Department of Family and Protective Services withdraws the proposed amendments to §746.2101 and §746.2103 which appeared in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4909).

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006270
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: November 5, 2010
For further information, please call: (512) 438-3437

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 22. SUBSTANCE ABUSE AND DEPENDENCY TREATMENT SERVICES

1 TAC §354.1311, §354.1312

The Texas Health and Human Services Commission (HHSC) adopts the amendments to §354.1311 and §354.1312, concerning Medicaid substance abuse and dependency treatment services. Section 354.1311 is adopted with changes to the proposed text as published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3917). The text of the rule will be republished. Section 354.1312 is adopted without changes to the proposed text as published and will not be republished.

Background and Justification

Texas Medicaid currently provides coverage for certain substance abuse services for individuals under the age of 21. The Legislative Budget Board's 2009 *Texas State Government Effectiveness and Efficiency* report found that less than a quarter of adults with a diagnosis of substance abuse received treatment in 2006. The report also found that individuals with a substance abuse disorder have twice the medical expenses (e.g., hospital emergency room costs) of those without a substance abuse disorder and that these costs can be better managed with treatment.

The 2010-2011 General Appropriations Act (Article IX, Section 17.15, SB 1, 81st Legislature, Regular Session, 2009) directs HHSC to implement a comprehensive Medicaid substance abuse benefit for adults. In directing HHSC to develop Medicaid substance abuse benefits for adults, the Texas Legislature assumed the treatment of substance abuse problems will result in a savings to the Medicaid program and offset any cost associated with the new benefit. In order to implement the substance abuse benefits required in SB 1, HHSC is adopting these rules.

Comments

The 30-day comment period ended June 22, 2010. During this period, which included a public hearing on June 15, 2010, HHSC received three sets of comments regarding the proposed amendments. A summary of the comments and HHSC's responses follow.

Comment: The Association of Substance Abuse Programs (ASAP) commented that Medicaid managed care plans are subject to the Wellstone-Domenici Mental Health Parity and Addiction Equity Act of 2008 and the interim final rule. Health plans that provide mental health or addiction treatment benefits must provide the same financial terms, conditions, requirements, and treatment limitations for mental health and addictions as they do in providing "predominant" coverage for medical and surgical conditions. More guidance is forthcoming from the Centers for Medicare and Medicaid Services regarding Medicaid managed care plan compliance. ASAP indicated they it wanted to bring this to the attention of HHSC because treatment limitations are indicated in the proposed rule amendments.

HHSC Response: HHSC acknowledges the comment but no changes were made to the rules. The Mental Health Parity Act applies to group health plans and requires parity of behavioral health and medical coverage. This provision of federal law applies to state Medicaid managed care programs. HHSC has amended the Medicaid managed care waivers and contracts to comply with the Mental Health Parity Act. This provision does not apply to Medicaid fee-for-service or Primary Care Case Management.

Comment: ASAP commented that the amendment to §354.1311(c) - (e) does not mention specialized female services. ASAP stated that it is important to reference specialty treatment for pregnant women and women with children because it allows access to treatment at a time of enhanced motivation for many women. Specialty treatment for pregnant females helps to deliver healthy babies and specialty treatment services for women with children removes barriers to treatment when their children can come with the mothers, keeps families together and helps break the familial cycle of addiction.

HHSC Response: HHSC acknowledges the benefits of specialized female treatment services but no changes were made to the rule. Treatment of women in their third trimester of pregnancy and women with children who bring their children into treatment with them is recognized as a subset of specialized female services by the Department of State Health Services (DSHS). This treatment model includes a unique subset of services that provides reimbursement for skills training, such as parenting and budgeting classes, and co-housing the children with the mother. These services are not eligible for federal match under the Medicaid program. Since federal match is not available for child care and these forms of skills training in Medicaid, HHSC and DSHS are working to make these services available through coordination with the Substance Abuse Prevention and Treatment Block Grant. Individuals in need of these specialized services will be referred to a Medicaid-enrolled block grant provider for treatment. Medicaid will continue to reimburse substance treatment services and specialized female services may be available through the block grant.

Comment: ASAP commented that the "Medication Assisted treatment benefit does not cover physicians who treat opioid dependence with Schedule III, IV, V narcotic medications. The use of these medications is a proven advance in treatment and the physicians who prescribe these drugs should be covered under Medicaid. It appears that only Methadone treatment programs are included and referenced Federal Code also requires a patient to have a 1-year established record of substance abuse before admission into treatment. Office-based medication assisted therapy does not require the patient to have a 1-year record of addiction. Utilization of new evidence-based medication therapies earlier in the addictive process and employed as long medically necessary can improve treatment outcomes and long term recovery. We urge HHSC to include reimbursement for properly certified physicians."

HHSC Response: HHSC acknowledges the comment but no changes were made to the rule. The rule requires that treatment of opioid addiction comply with federal regulations in 42 C.F.R. Part 8. However, the rule does not limit other recognized medication assisted therapy treatment models, nor does the rule restrict the treatment of opioid addiction to Methadone.

Comment: Reckitt Benckiser Pharmaceuticals commented that "in §354.1311(d)(3) of the proposed rules, medication assisted therapy is defined as opioid treatment programs under the Federal Code. Unfortunately, this definition ignores the advances of office-based medication assisted therapy as defined by the federal Drug Addiction Treatment Act of 2000 (Title XXV, Section 3502 of the Children's Health Act of 2000). DATA 2000 allows physicians, who meet certain qualifications, to treat opioid addiction with Schedule III, IV, V narcotic medications that have been specifically approved by the Federal Food and Drug Administration for that indication in an office-based setting."

HHSC Response: HHSC acknowledges the comment but no changes were made to the rule. The rule requires that treatment of opioid addiction comply with federal regulations in 42 C.F.R. Part 8. However, the rule does not limit other recognized medication assisted therapy treatment models, nor does the rule restrict the treatment of opioid addiction to Methadone.

Comment: Reckitt Benckiser Pharmaceuticals commented that "Under the Federal guidelines for opioid treatment programs, it is required that patients be addicted for at least 1 year before admission into such program. Office-based medication assisted therapy provides for treatment to begin as soon as the patient is diagnosed as dependent or abusing and to continue for as long as deemed medically necessary to ensure a better chance for long-term recovery."

HHSC Response: HHSC acknowledges the comment but no changes were made to the rule. The rule requires that treatment of opioid addiction comply with federal regulations in 42 C.F.R. Part 8. However, the rule does not limit other recognized medication assisted therapy treatment models, nor does the rule restrict the treatment of opioid addiction to Methadone.

Comment: ASAP commented that Screening, Brief Intervention and Referral to Treatment (SBIRT) is not addressed in the rule nor the Texas Medicaid state plan. ASAP stated that "this is an evidence-based program that works, saves money, and is already included as a Medicaid benefit in other states. Medicare created two new G codes to allow providers to bill for alcohol and drug assessment. The American Medical Association has also approved two CPT codes (based on time devoted to the service)."

HHSC Response: HHSC acknowledges the comment but no changes were made to the rule. SBIRT is currently a Medicaid benefit for children under 21 years of age. The benefit was not expanded as part of this rule amendment.

Comment: ASAP commented that "research clearly demonstrates that time in treatment is a primary indicator of treatment success and 90 days represents the most beneficial length of service. Under Outpatient treatment, the rule allows for time beyond the stated limitation if it is medically indicated. This opportunity should also be included for residential detoxification and residential treatment--i.e. *Residential treatment shall be limited for a maximum of 35 days per episode of care unless medically indicated and no more than 2 episodes of care per a 6-month period."*

HHSC Response: HHSC acknowledges the comment but no changes were made to the rule. Residential services are included as a benefit to individuals enrolled in Medicaid who meet the benefit coverage criteria. The substance abuse benefit allows for the continuum of care throughout treatment as coverage is available for an initial assessment, detoxification, residential treatment, outpatient treatment and medication assisted therapy. Services must be provided in the least restrictive and most clinically appropriate setting based on the individual's need. Individuals may receive the full continuum of treatment services for 90 days to include detoxification, residential treatment, and outpatient treatment when medically indicated, but are limited to 35 days of treatment in a residential setting per episode of care.

Statutory Authority

The amendments are adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; and the Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

§354.1311. Benefits and Limitations.

(a) Subject to the specifications, conditions, limitations, and requirements established by the Health and Human Services Commission (HHSC) or its designee, substance abuse and dependency treatment services are those services provided by a provider or facility licensed by the Department of State Health Services to provide substance abuse and dependency treatment services.

(b) Substance abuse and dependency has the definition assigned in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.

(c) Covered outpatient substance abuse and dependency treatment services shall include:

(1) assessment;

(2) outpatient detoxification;

(3) outpatient group, individual, and family counseling; and

(4) medication assisted therapy.

(d) Covered outpatient substance abuse and dependency treatment services shall be limited as follows.

(1) Assessment shall be limited to one assessment per episode of care unless medically indicated.

(2) Outpatient group counseling services shall be limited to a maximum of 135 hours per person per calendar year unless medically indicated.

(3) Medication assisted therapy shall be limited to a medically appropriate duration of treatment. In the treatment of opioid addiction, treatment must comply with federal regulations codified at 42 Code of Federal Regulations Part 8-Certification of Opioid Treatment Programs, for coverage.

(e) Covered residential substance abuse and dependency treatment services include:

(1) residential detoxification; and

(2) residential treatment.

(f) Covered residential substance abuse and dependency treatment services shall be limited as follows.

(1) Residential detoxification shall be limited to a medically appropriate duration of service based on medical need and level of intoxication for a maximum of 21 days per episode of care.

(2) Residential treatment shall be limited to a medically appropriate duration of service based on medical need and severity of addiction for a maximum of 35 days per episode of care and no more then 2 episodes of care per a 6-month period.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006330
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 1, 2011
Proposal publication date: May 21, 2010
For further information, please call: (512) 424-6900

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CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §355.773

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §355.773, concerning Reporting Costs by Mental Retardation Local Authority (MRLA) Providers, without changes to the proposed text as published in the September 17, 2010, issue of the *Texas Register* (35 TexReg 8466) and will not be republished.

Background and Justification

Effective September 1, 2003, the Department of Aging and Disability Services (DADS) eliminated the Mental Retardation Local Authority (MRLA) program and transferred individuals receiving MRLA and Home and Community-based Services - OBRA (HCS-O) waiver program services to the Home and Community-based Services (HCS) program. DADS' actions were in response to §2.76, H.B. 2292, 78th Legislature, Regular Session, 2003 which redefined the responsibilities of mental retardation authorities (MRAs), program providers, and DADS. In response to DADS' elimination of the MRLA Program, HHSC proposed to repeal the cost reporting rule for MRLA providers.

Comments

The 30-day comment period ended October 18, 2010. During this period, HHSC received no comments.

The repeal is adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006266
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 25, 2010
Proposal publication date: September 17, 2010
For further information, please call: (512) 424-6900

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS
SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §25.107

The Public Utility Commission of Texas (commission) adopts an amendment to §25.107, relating to Certification of Retail Electric Providers (REPs), with changes to the proposed text as published in the May 14, 2010, issue of the *Texas Register* (35 TexReg 3711). The amendments will provide requirements for certification as a distributed generation REP serving large commercial customers, allow the commission to draw on a letter of credit upon revocation of a REP certificate, define erroneously imposing switch-holds or failing to remove switch-holds within the prescribed timeline as a significant violation of the rule, and make other clarifying changes to the rule. This order amends a competition rule and is, therefore, subject to judicial review as specified in Public Utility Regulatory Act, Texas Utilities Code

Annotated §39.001(e) (Vernon 2007 and Supplement 2010) (PURA). This amendment is adopted under Project Number 37685.

The commission received comments on the proposed amendment from Alliance for Retail Markets (ARM), City of Houston, Direct Energy (Direct), Electric Reliability Council of Texas (ERCOT), Office of Public Utility Counsel (OPUC), Reliant Energy Retail Services (Reliant), Steering Committee of Cities Served by Oncor (Cities), Tenaska Power Services Company (Tenaska), Texas Industrial Energy Consumers (TIEC), Texas Energy Association for Marketers (TEAM), Texpo Power, LP (Texpo), TXU Energy (TXU), and Young Energy (Young). The commission also received joint initial comments from AEP Texas Central Company, AEP Texas North Company, CenterPoint Energy Houston Electric and Texas New Mexico Power Company (Four Transmission and Distribution Utilities (TDUs)) and joint reply comments from AEP Texas Central Company, AEP Texas North Company, and CenterPoint Energy Houston Electric (Three TDUs).

The commission posed five questions for comment, and the comments are summarized below.

Question 1. Should an expedited process be established for approval of a change in control pursuant to §25.107(i)(3)(A) where the purpose of such transfer is to avoid a mass transition to Provider of Last Resort (POLR) of a REP's customers? If your response to the question is "yes," please provide suggested language.

ARM, Reliant and TXU did not believe that the commission should involve itself in the transfer of a REP Certificate. ARM stated that the commission lacks statutory authority to impose this requirement on the sale/transfer/merger transactions in the retail electric market. It contended that the imposition of this requirement in the context of a competitive market is inappropriate as a policy matter. Currently, the commission has to approve or reject an application within 75 days, which ARM contended was unnecessarily lengthy and would create a level of uncertainty in the market about the consummation of the transaction and could cause the deal to disintegrate. Worse yet, ARM stated, an acquiring company might hesitate to enter into such transactions out of concern about the effect a prolonged period of regulatory review would have on its financial standing while the commission review is being conducted. ARM proposed that if the commission adopts change in control provisions, the timeline should be shortened from 75 days to 30 days and should not be subject to an extension for good cause.

Reliant stated that the fact this question is posed serves to highlight why a preapproval process is not prudent--requiring preapproval interferes with lawful business transactions. The simple fact that the commission might become involved in deciding whether a transaction should go forward actually increases the probability of a potential mass transfer to POLR.

TXU stated that streamlining the transfer of customers that might otherwise go to POLR will benefit customers and the retail market. Given the short timelines for POLR transitions, a preapproval requirement, even on an expedited basis, would hamper a REP's ability to avoid a mass transition. TXU also stated that in most cases the transfer would be to an existing REP and the REP would simply be adding to its customer count. The commission would not normally review a REP adding customers through normal sales channels, and REPs should not be treated any differently under the proposed rule. Finally, TXU added, if the commission were to require preapproval in the one instance in which preapproval is within its authority, a direct transfer or sale of a REP that would result in a previously un-certificated entity providing retail electric service, then it is doubtful that review could be accomplished expeditiously enough to avoid a transition of customers to POLR.

TEAM stated that historically the avoidance of a customer being transferred to POLR has been accomplished through a transfer of customers to an existing REP, but not a change in control of the REP who is on the verge of exiting the market. If the REP is on the verge of exiting the market, it does not seem that the commission's rules should take extraordinary measures to preserve that certificate. Regulatory preapproval of all transactions involving REP ownership is unnecessary. TEAM also stated that it is important to recognize that an investment of capital in an ongoing operation where there is no change in the management team upon which a REP attained certification is much different than a transaction under which a REP's certificate is being transferred to a new management team.

Four TDUs believed that the new rules should apply to any change of control and allowing an expedited process would increase the likelihood of a sale of a certificate to a party that has not met the rule requirements and would pose risks for the customers and the rest of the market.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Question 2. Is it appropriate to require disclosure of a felony or misdemeanor charge where the charge has not resulted in a conviction, a guilty plea, or a plea of nolo contendere?

ARM, Reliant, TEAM, and TXU did not believe it would be appropriate to require disclosure of a felony or misdemeanor charge when the charge has not resulted in a conviction, a guilty plea, or a plea of nolo contendere. Reliant, TEAM, and ARM stated that given that the criminal justice system in this country is founded upon the concept of "innocent until proven guilty," it is inappropriate to require disclosure of charges or allegations. ARM submitted that information of this nature should not be considered for this purpose as it has no real probative value or relevance to the question of whether certification should be granted. TXU agreed and stated that imposition of this inquiry requirement on a REP is tantamount to the REP asking a group of its employees whether they have been arrested in the last ten years. Under Equal Employment Opportunity Commission (EEOC) guidelines, best practices for employers are to avoid inquiring about arrests because the EEOC has determined that the use of arrest records in employment decisions has a disparate impact on some protected groups. TXU stated that at least two troubling consequences may result from the commission requiring REPs to inquire is that first, REP inquiries about arrests may create additional liability exposure for the REP and secondly, the commission may put itself in the position of defending that a REP certification was appropriately denied in a situation where an applicant disclosed requested arrests.

ARM stated that if the commission requires submission of arrest information, then it should require only information about criminal charges that were allegedly committed in a business or com-

mercial context and are relevant to an assessment of managerial and resources and ability.

TEAM stated that if the charge is ongoing and yet unresolved, it may be reasonable to require disclosure, but such disclosure should not serve as an automatic bar to certification.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Question 3. What types of misdemeanors described by subsection (g)(3)(C)(iii) would be relevant to certification as a REP?

TXU commented that the commission has appropriately identified the misdemeanors that would be relevant to certification as a REP.

TEAM stated that proposed subsection (g)(3)(C)(iii) is overly broad and the standard that should be applied is requiring REPs to disclose misdemeanor crimes of moral turpitude.

ARM stated that the distinction drawn in this subsection should be between types of crimes rather than the level of seriousness of the crimes. The types of felonies and misdemeanors specified in subsection (g)(3)(C) should include crimes committed in a business or commercial context that bear directly on an evaluation of the applicant's managerial resources and the ability and experience of its management staff, consistent with proposed subsection (g)(2). ARM stated that they should also include crimes committed in the course of the provision of utility or utility-like services pursuant to a government-issued license or certificate that are also germane to evaluation of managerial resources or duty. ARM recommended that the following crimes be included within the scope of the proposed rule: bribery, conspiracy, fraud, embezzlement, extortion, forgery, theft, racketeering, and tax evasion. ARM stated that the list was not exhaustive, but the commission should include only those crimes that relate directly to the commission's assessment of an applicant's managerial resources and abilities.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Question 4. Should subsection (i)(3)(A)(ii) define a change in control as a sale of a percentage of the REP's assets or as a sale of "all or substantially all" of the REP's assets? If a percentage should be used, what percentage is appropriate?

TXU, ARM, TEAM and Reliant opposed the standard proposed. TXU believed that this provision was duplicative of provisions in existing commission rules and believed that the proposed rule is beyond the commission's authority to the extent it would capture transactions other than the direct sale or transfer of a REP certificate that would result in a previously un-certificated entity providing retail electric service. To the extent that this provision seeks to capture transfers of customers or assets other than the REP certificate, TXU submitted that it was unnecessary because existing rule provisions, both governing the transfer of customers (§25.493) and requiring a REP to promptly notify and seek a certificate amendment for material changes to the basis for its certification (§25.107(i)(3)), enable the commission to carry out its statutory charge to ensure that customers are served by REPs with the requisite financial, technical and managerial qualifications. Further, TXU stated, if the sale of assets involved the sale of a REP certificate that would result in a previously un-certificated entity providing retail electric service then it would also be covered by the material change notice and amendment requirement in existing §25.107(i)(3). Alternatively, if the commission disagrees with TXU that the existing requirement is adequate, then the requirement should be changed to 75% or more rather than "all or substantially all" since this would be burdensome to administer. Finally, TXU stated that requiring preapproval of the sale of a REP would exceed the commission's statutory authority in the case of the transfer of customers to an existing REP because these transactions would not result in a previously un-certificated entity providing retail electric service.

ARM contended that the percentage designated in the proposed rule is irrelevant if the sale of tangible assets will always include the transfer of a REP certificate. The proposed rule defines a change in control of a REP to include when "a REP sells, assigns, or otherwise transfers its REP certificate to another person" and therefore this is redundant and should be eliminated.

TEAM stated that it is the sale of assets coupled with a material change in the management team that should be considered a change in control subject to prior approval. TEAM argued that regulatory preapproval of a change in control is unnecessary and could actually be harmful to customers and the market. TEAM commented that it is important to recognize that an investment of capital in an ongoing REP operation where there is no change in the management team upon which a REP attained certification is much different than a transaction under which a REP certificate is being transferred to a new management team.

Reliant stated that whether or not the change in control is defined as a percentage of assets or as a sale of "all or substantially all" of the REPs assets is immaterial to the question of whether the commission has authority to pre-approve transactions that result in a change in control. Reliant commented that subsection (i)(3) of the existing rule already provides that a REP must apply to amend its certification within ten working days of a material change to the information provided as the basis for approval of the application. Additionally, Reliant continued, subsection (i)(8) of the current rule requires a REP to respond within three days to a commission staff request for information to confirm continued compliance.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Question 5. Should certain REPs, such as REPs certificated under subsection (f)(1)(A), be exempt from subsection (i)(3), which requires prior approval for a change in control of a REP?

Direct, ARM, Reliant, and TXU Energy opposed prior commission approval for a change in control of a REP. Direct stated that if the commission decides to include subsection (i)(3), it should not apply to REPs certificated under subsection (f)(1)(A)(i) which pertains to REPs that have met the "access to capital" requirements by means of an investment grade credit rating. Direct stated that it is proper for the commission to set a policy that differentiates compliance with proposed subsection (i)(3) based on

the financial strength of a REP as evidenced by the resources utilized to demonstrate and maintain compliance with the financial requirements. According to Direct, an investment-grade credit rating indicates issuance of public debt that has been thoroughly scrutinized by credit rating agencies who have determined that the investment-grade entity has sufficient resources to support its businesses under a range of business scenarios.

TXU stated that if the commission decides to adopt subsection (i)(3)(A)(i) and require preapproval of transfers of REP certificates that would result in a previously un-certificated entity providing retail electric service, there should be no correlation between commission prior approval of a transfer and the investment grade credit rating or tangible net worth standards. Instead, the focus should stay on whether any new, un-certificated entity meets the qualifications to provide retail electric service. ARM stated that if the commission chooses to go forward with the provisions in subsection (i)(3), ARM does not take a position with respect to whether certain REPs should be exempt.

Four TDUs stated that all REPs should be required to demonstrate compliance with the requirements prior to the transfer. They argued that because a REP qualified under subsection (f)(1)(A) is not required to post security, it is particularly important that an entity acquiring such a REP also meet the financial standards of subsection (f)(1)(A) or that it provide the security required under subsection (f)(1)(B) before it takes control.

TEAM stated that to allow an exemption for one group of REPs based solely on the financial standards under which they are certificated does a disservice to the very important remaining standards in the rule, particularly the management experience standards. TEAM argued that such an exemption would unreasonably discriminate against one sector of the market, and would not ensure the necessary protections for customers.

TIEC stated that Option 2 REPs should be exempt from this subsection altogether. TIEC recognized Option 2 REPs are exempt from subsections (i)(3)(D) and (E) but expressed the view that they should also be exempt from subsections (i)(3)(A) - (C). TIEC stated that issues relating to assignment of agreements resulting from the change in ownership for both the REP and the customer are generally addressed in contracts between Option 2 REPs and their customers. These REPs and their customers should have the flexibility to address these issues in the manner most sensible for their particular businesses.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

General Comments

ARM, Reliant, and TEAM noted that the commission amended this rule just over one year ago. ARM and Reliant stated that no compelling reason exists to modify the rule again. ARM stated that there is nothing to suggest that the stricter certification requirements in the current rule will not achieve the commission's desired objectives. TEAM stated that some experience with the new rule is necessary before additional major changes are made. Three TDUs replied that the prior amendments to the rule did not address REP transfers and that it is very appropriate to take that issue up in this rulemaking.

Commission Response

The commission agrees with ARM, Reliant, and TEAM that this rule was amended just over a year ago and concludes that it is appropriate to refrain from making extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market.

City of Houston stated that it serves as the ombudsman for its residents regarding various utility related service issues. City of Houston requested that any municipality in which a REP offers service be designated as a person entitled to notice of events such as a REP's cessation of operations or bankruptcy filing.

Commission Response

The commission declines to modify the rule as requested by the City of Houston. The current rule already requires REPs to notify the commission at least 45 days prior to ceasing operations. The City of Houston and other cities can monitor the commission's filings and can determine whether they would be affected by the REP's notice. The commission believes that it would be burdensome and unnecessary for REPs to provide additional notice to every municipality in which they operate.

Subsection (b)(3)

ARM proposed to clarify this definition by relocating the phrase, "either directly or indirectly through one or more affiliates."

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (b)(7) and (b)(10)

ARM stated that proposed subsection (g)(3)(C)(i) - (ii) broadly requires the submission of criminal history information relating to "any" felony. With respect to criminal history information relating to misdemeanors, it more narrowly attempts to identify the types of those crimes subject to the disclosure requirements in subsection (g)(3)(C)(iii)(iv). These proposed provisions identify misdemeanors involving the provision of utility or utility-type services and subject matter falling into the scope of this requirement. ARM proposed that subsection (g)(3)(C)(i) - (ii) be similarly narrowed, so that only information about felonies germane to the commission's evaluation of the applicants managerial experience and abilities be required to be disclosed. ARM proposed that subsection (g)(3)(C) simply refer to a "criminal charge" and that subsections (b)(7) and (b)(10) would then no longer be necessary and should be deleted.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (c)(2)

ARM opposed the requirement for an applicant for REP certification or certification amendment to provide the results of an independent background investigation from a firm chosen by the commission. First, ARM stated, the commission is not authorized to require an applicant to bear the cost of an independent background investigation and report. Second, requiring an applicant to bear the expense of an independent background inves-

tigation and report that is generated in lieu of the commission's own investigation and report raises questions about the appropriateness of shifting the commission's investigative responsibilities to a third party, absent special circumstances. Third, ARM stated, discrimination issues are critical in the application of any independent background investigation requirement, because proposed subsection (c)(2) appears to give the commission sole discretion in determining whether an applicant must undertake and pay for an independent background investigation. This means that some applicants might be required to bear expenses while others are not, and the costs could vary depending on the subject matter of the background investigation. ARM added that it is unclear how an applicant could submit the results of a background investigation at or near the time it submits its application unless the commission requested the undertaking of an investigation sufficiently in advance of the filing of the application.

TEAM argued that requiring a background investigation creates a barrier to entry and a barrier to selling a stake in a REP to another entity. Additionally, TEAM was concerned about the costs, because presumably the commission would select major accounting and auditing firms. TEAM also argued that the proposal was heavy-handed, because facts would be presented to the commission by the applicant and those facts are to be studied and corroborated by the commission, not the applicant itself.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (d)(2)(B)

TIEC commented that Option 2 REPs should be exempt from the entirety of subsection (i)(3) of the proposed rule, as detailed in the comment summary for Question No. 5 above, and suggested revised rule language for subsection (d)(2)(B) to that effect.

Reliant stated that rather than exempting Option 2 REPs from preapproval, it would be more appropriate not to require preapproval for either Option 1 or Option 2 REPs, given that the material change provision in the existing rule is adequate to ensure customer protection.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (d)(3)

Reliant opposed the addition of an "Option 3" REP category, arguing that such a category is unnecessary. Reliant commented that if the REP would not be interacting with ERCOT, the entire transaction would take place behind the customer's meter and, therefore, no REP certification is needed. Reliant also commented that if the distributed generation will be connected to the grid for possible delivery, then the generator must register as a power generation company (PGC). Reliant stated that a REP does not need to be inserted between the PGC and the customer because the transaction between the PGC and the customer is not necessarily a sale of electricity to a customer.

Commission Response

The commission disagrees with Reliant. PURA §39.352 states that "(a)fter the date of customer choice, a person . . . may not provide retail electric service in this state unless the person is certified by the commission as a retail electric provider." The Option 3 REP category allows a person to sell electricity to a retail customer from a distributed generation facility located on a site controlled by that customer. A person that provides this type of service is providing retail electric service under PURA §39.352 and must be certified by the commission as a REP. The purpose of this amendment is to permit a person other than the customer to own the distributed generation equipment, which should foster adoption of distributed generation, particularly renewable distributed generation, by commercial customers. Finally, the commission concludes that installation of distributed generation equipment can be performed by a Licensed Electrician, consistent with the requirements of the Texas Department of Licensing and regulation, and modifies the rule accordingly.

Subsection (e)(1)(A)

REPs generally agreed that there is value in branding through multiple names and that to impose new limitations on branding is unnecessary, inefficient, and would not enhance customer protections. ARM stated that the proposed amendment to this subsection inexplicably restricts REPs to the use of a single assumed name as of January 1, 2011, contrary to common business practices. Many REPs have operated under more than one assumed name since 2002 and there is nothing extraordinary or unusual about a company's use of more than one trade name in a competitive market. ARM stated that a REP may decide to use a distinctive trade name to brand new retail offering predicated on smart meter technology. Some REPs have employed a different trade name in the provision of POLR service. ARM noted that REPs have used a second or third trade name to market retail products to a particular customer class or for the specialized purpose of serving customers obtained in the course of a sale/transfer/merger transaction. ARM also expressed concern that customers (and others) may wrongly perceive the reduction in assumed names as a mass exit of REPs from Texas as 2011 approaches. This erroneous perception will work to the detriment of consumer confidence in the State's competitive retail electric market. TEAM agreed. ARM proposed that if the commission decides to go forward with this that the compliance deadline must be extended by at least six months so that REPs can achieve compliance with the new requirement.

TEAM agreed that assumed names should not be limited, as this recommendation would hinder REPs from bringing all of the advantages of a competitive electric market. TEAM stated that a REP may want to market pre-paid products under a different business name. The prepaid market is a subset of the residential mass market, and a REP that has already rooted itself in the residential market may want to protect its brand while entering the prepaid market with a new business name. TEAM believed the competitive market is meant to foster company growth such as this. TEAM stated that this proposal is akin to telling Frito Lay that it cannot market its chips under different monikers (Doritos, Tostitos, Sun Chips, etc.) or telling Starbucks that it cannot sell coffee under Seattle's Best. Texpo added that it is common for companies to use different supplier names to reach different market sectors. Texpo provided the examples of Lexus (high service level and more expensive prices) and Toyota (discounted prices for similar cars with a more moderate service level and less luxury items); and other examples. Texpo noted that each

of these examples has different marketing strategies, cost structures, target audiences, and prices to accommodate differences in customer preferences just like Texpo.

Texpo stated that no explanation or evidence of customer confusion of trade names was presented. The commission's current rule has been in place for ten years, during which the robust competition in Texas' retail market has become a success story receiving national recognition. If customer confusion posed a significant problem, surely by now (or in 2007 or 2009 when the rules were revised) the commission would have reduced the number of trade names for future REP certification applications. Texpo stated that it is a certificated retail electric provider that actively uses three commission-approved trade names: Texpo Energy, Y.E.P. and Southwest Power and Light. Texpo has invested resources and assets worth several million dollars building each of these brand names. Texpo stated that each trade name is the subject of one or more trademarks or intellectual property rights under common law and otherwise and each has its own logo. Texpo argued that this proposal would potentially have far-reaching implications for Texas' retail electricity market. The long standing commission rule, principles of deregulation, goals of attracting further investment into Texas' electricity markets and market confidence are all at odds with the retroactive effect of the proposal, which would destroy entire brand names, marketing systems, and other valuable property rights, through what may be viewed by lenders and investors and worrisome and a dramatic change to Texas' electricity markets. Texpo objected only to the retroactive effect of the proposal. If the commission wants to reduce the number of permissible REP trade names, it should adopt one or more narrower, less harmful alternatives to the proposal which include: (1) apply the changes prospectively to REPs not yet certificated; (2) apply the change prospectively to any assumed REP name not yet commission-approved; (3) apply the change prospectively to any assumed REP name that is not both commission-approved and currently in use; (4) allow REPs to use trade names acquired through merger and acquisition transactions regardless of the numerical limit in the rule; and (5) reject the proposal to change the current, long-standing rule regarding REPs trade names.

Texpo stated that this proposal is inconsistent with the commission's treatment of power generation companies, power marketers and aggregators. Texpo also stated that REPs must disclose their trade names and the accompanying certificate number repeatedly and prominently to enrolled and prospective retail customers. Texpo argued that this proposal would impose wasteful and duplicative costs as retroactive aspects of the proposal would require destruction and reordering of business documents, modifications to EFLs, changes to websites and web addresses and many other tasks. Reliant stated that REPs should be allowed to pursue branding strategies that go beyond just having one business name, for reasons similar to those suggested by Texpo.

Young Energy stated that this proposed amendment creates an unreasonable and significant economic hardship on REPs. Young Energy stated that businesses do not act monolithically and neither do customers; within each of these market segments some groups may respond more favorably to one brand name than another and it is essential that a REP be allowed to use multiple assumed names to tailor its marketing brand and message and successfully market its products.

TXU Energy agreed with ARM, Reliant, TEAM, Texpo, and Young Energy that limitations on assumed names would diminish a REP's product branding and goodwill, which would potentially limit REP product offerings in the market. TXU stated that the use of assumed names is one vehicle by which different brands can be precisely positioned to appeal to specific market segments of customers. TXU believed this practice is positive and a healthy result of a competitive market wherein companies position products and brands to meet the needs of various market niches.

Tenaska urged the commission to apply the assumed name limitation solely to Option 1 REPs, because Option 2 REPs' customers have signed a notarized affidavit stating that the customer is satisfied that the electric provider meets the standards required by PURA. Tenaska uses different assumed names as an accounting and organizational tool. For example, all the meters for one large industrial customer may be grouped and served under a different assumed name. Another example is a customer may require ERCOT settlements applicable to its load to be administered in a way that can best be implemented by segregating its account from that of other customers. ERCOT treats each name as a separate Load Serving Entity for the purposes of registration, qualification and settlement and each of these has been tested at ERCOT. Tenaska strongly prefers to continue using these names and groupings in the future to avoid incurring the financial and resource cost and the potential loss of efficiencies and the disruption to Tenaska's existing REP to Qualified Scheduling Entity (QSE) mapping structure. ERCOT agreed with Tenaska and added that, if the published rule were adopted, a significant number of REPs would have to undergo full qualification testing for each new Load Serving Entity (LSE) registration. Additionally, ERCOT stated that significant and costly changes would be required to the REP to QSE mapping structure at ERCOT. ERCOT also noted that the published rule could require REPs to re-register with the commission and ERCOT for the separate or consolidated REP certifications and LSE registrations.

Three TDUs disagreed with the REP commenters and stated that there is value in limiting the number of business names. Three TDUs stated that the use of multiple assumed names creates complexity and increases the administrative workload for other market participants. For example, a separate Data Universal Numbering System (DUNS) number would usually be required for each business name, with separate deposits and bank accounts in the TDU's system for each one. In addition, although use of multiple names can be used to distinguish between product offerings, it can also be used to hide and confuse. If a REP operates under multiple names, a consumer may think it is switching REPs only to find it is still doing business with the same entity. The limitation will allow customers to have more clarity about who they are dealing with and to more easily make educated choices between REPs. It will also allow the commission to have more ability to track REPs.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (f)(1)(B)

TXU, ARM, and TEAM opposed deletion of the phrase "or its guarantor" from subsection (f)(1)(B). TXU asserted that the change would require the REP to directly provide and maintain

the letter of credit and negotiate directly with financial institutions to obtain the letter of credit. TXU argued that such a change would impose additional costs on the market and customers, without any commensurate benefit, and that customers and the retail electric market are protected regardless of whether the REP obtains the letter of credit directly from a financial institution or if a guarantor of the REP obtains the letter of credit. ARM argued that the phrase "or its guarantor" should not be deleted because a letter of credit falls within the scope of commitments in the subsection (b)(7) definition of "guarantor." TEAM expressed concern that such changes to the financial requirements create regulatory uncertainty that impacts the relationships between REPs and their banks and investors.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (f)(4)(C)

Four TDUs stated that the last sentence of subsection (f)(4)(C) should make clear that unaudited statements filed with government agencies can only be used to satisfy the requirement for unaudited quarterly statements, and that unaudited statements should not be a substitute for the filing of yearly audited statements.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (f)(4)(F)

ARM recommended that subsection (f)(4)(F) further clarify that a letter of credit must permit a draw in part or in full "in accordance with paragraph (6) of this subsection," because paragraph (6) specifies the manner and order in which the proceeds from a letter of credit may be used.

Commission Response

The commission disagrees with ARM. Subsection (f)(4)(F) governs requirements for a commission-approved letter of credit and provides a clear trigger for drawing funds from letters of credit. The existing rule may not permit the commission to draw on a letter of credit if a REP leaves the market without experiencing a mass transition of its customers but still leaves obligations to customers, ERCOT, or other market participants that are intended to be protected by the letter of credit. Subsection (f)(6) governs the distribution of funds that have been drawn. Because a draw of funds and the distribution of those funds are separate acts, it is not appropriate to require that "a letter of credit must permit a draw in part or in full in accordance with paragraph (6) of this subsection." In other words, it does not make sense to require that funds must be drawn in accordance with how the funds must be distributed.

Subsection (g)

OPC stated that refining and strengthening the licensing requirements of REPs as recommended by the proposed rule will increase transparency and accountability in the retail electricity market.

ARM did not believe any changes should be made to the technical and managerial requirements but offered proposed amendments if the commission decided to change the rule. TXU submitted that the technical and managerial requirements found in the current rule are sound and do not require amendment. ARM agreed.

Reliant stated that in general the changes to subsection (g) include numerous changes that attempt to obtain information from applicants including information concerning allegations against a principal or affiliate during the previous ten years and stated that including allegations rather than actual proven complaints is unreasonably burdensome and should not be adopted.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (g)(2)

TXU expressed concern that the proposed rule's amendments to subsection (g)(2) are impermissibly and unconstitutionally vague as they fail to provide sufficient guidance and objective criteria to the commission in determining whether a REP satisfies the technical and managerial requirements. By allowing the commission to consider information discovered by staff during its review of an application, the results of an independent background investigation and any other information, no guidance is provided as to what would serve as the basis for a finding that the REP lacked the requisite managerial and technical requirements.

ARM took issue with the word "may" in subsection (g)(2) as it suggests the commission may exercise its discretion to apply to one or more of the criteria differently from case to case. ARM recommends use of the word "shall."

ARM proposed to eliminate the independent background investigation requirement. If the requirement is retained, ARM proposed that the background check be performed at the commission's request by a firm chosen by the commission.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might create additional regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (g)(3)

ARM contended that the rule should be revised consistent with its responses in Question (2) and (3). ARM suggested that information solely relating to charges or allegations submitted should be excluded. ARM stated that no distinction should be drawn between felonies and misdemeanors. ARM commented that the scope of the disclosed information include only business and commercial-related crimes germane to an evaluation of managerial resources and ability, and only crimes committed in the course of the provision of utility or utility-like services should be included. ARM also believed that the ten year period is unduly long and that the required information should be limited to a five year period.

ARM recommended disclosure of a more limited scope of information pursuant to these proposed subsections to make amendments less frequent and burdensome. First, ARM recommended the percentage threshold for ownership of voting securities or other ownership interests of the applicant in subsection (g)(3)(H) should be increased to ten percent, which would result in at most ten persons with an ownership interest in a REP that might need to be reported. ARM offered that the term "executive officers" in subsection (g)(3)(I) is subject to different interpretations by REPs. ARM stated that the three principle executive management positions in most companies are the chief executive officer, chief financial officer, and the chief operating officer. ARM believed that the requirement to disclose the applicants senior management should be deleted as knowing senior management will serve little purpose, given that those employees are not ultimately responsible for the company's actions and policies in the same manner as executive management, and there is high turnover in those positions and the costs of complying with the amendment requirements would far outweigh any benefits gamine from the disclosure of the information.

TXU requested deleting the phrase "or affiliate of the applicant" from disclosure of certain information about civil, criminal and administrative proceedings. ARM agreed.

TXU also stated that subsection (g)(3)(H) should be modified in two ways. First, the word "disclosure" is overly broad and ambiguous and should be replaced with the "identification." Second, the term "indirectly" should be deleted because it requires identification of upstream owners that have no impact on the REP's qualifications for REP certification.

Four TDUs stated that the practice of initiating a REP certificate for the purposes of ERCOT testing, and then selling it to another party should be prohibited.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that proposed to inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (i)(3)

TXU, Reliant, and ARM commented that the commission does not have the authority to require preapproval of a transfer of a REP certificate. TXU commented that proposed subsection (i)(3)(A)(iii) - (iv) exceed the commission's statutory authority, run counter to the general objectives of the statute, and impose additional burdens in excess of the statute. TXU argued that because PURA §39.352 fails to mention the phrase "changes in control" and only discusses the requirements for certification, the statute indicates that the only entities required to make the statutory showings to the commission are those that have not previously been certificated. TXU noted that while the commission is statutorily authorized to adopt rules to "amend certificates or registrations to reflect changed ownership or control," TXU stated that this authority is limited to post-transaction amendments of a REP certificate.

TXU and ARM suggested that by specifically authorizing the commission to pre-approve transactions involving the change in control of a fully-regulated utility, while not creating similar authority for REP transactions, the Legislature has indicated that it does not intend for the commission to have such authority over REPs.

In regard to subsection (i)(3)(B), TXU commented that it would additionally require entities not subject to the commission's jurisdiction to seek commission approval prior to closing a variety of transactions even if the transaction would not result in any change to the qualifications of the subject REP. TXU claimed that by referencing the "acquiring person," "surviving entity" and "person who will otherwise gain control," the subsection requires the parent company, rather than the REP, to seek preapproval. TXU noted that the proposed subsection would impermissibly impact an entity over which the commission does not have jurisdiction because the transaction's viability could be compromised due to regulatory uncertainty posed by the preapproval process. Additionally, TXU commented that the commission declined to require preapproval as was proposed in 2007.

ARM and Reliant claimed that legislative history demonstrates that the commission lacks authority to require preapproval. Proposed PURA §39.158 in the as-filed version of Senate Bill 7 required a REP to obtain commission approval to merge, consolidate, or otherwise become affiliated with another REP. ARM and Reliant stated that this provision did not survive in the version of the bill that became law.

In reply comments, TEAM stated that it agrees with the comments of many of the other REPs that the existing commission rules provide the necessary authority to review and control the concerns with regard to whether an entity meets the REP certification criteria, as most recently adopted by the commission. TEAM also agreed with other commenters that preapproval is beyond the scope of the commission's statutory authority.

In reply comments, Three TDUs suggested that the commission does have the statutory authority to require preapproval because under PURA the commission is charged with being the gatekeeper and ensuring that no person does business as a REP unless the person meets certain standards. Three TDUs noted that PURA §39.352(a) is clear that a person "may not provide retail electric service in this state unless the person is certified by the commission as a retail electric provider, in accordance with this section." Three TDUs concluded that it would be irrational to interpret PURA as giving the commission the duty to be the gatekeeper, but as not having the power to control entry of providers through a back door. The commission should apply the same standards for providers trying to enter the market through the back door as it does for new entrants into the competitive market.

TXU and ARM commented that the current rule properly addresses changes in control and certificate transfers and that no changes are needed. TXU stated no changes are necessary because the current version of subsection (i)(3) makes it permissive to seek prior approval and that REPs are required to notify the commission and seek a certificate amendment within ten working days of a change in control that results in a material change. Additionally, TXU noted that subsection (i)(4) of the existing rule creates an additional layer of protection for consumers because it requires notice within 72 hours of non-compliance with the financial requirements of §25.107. TXU commented that the treatment of customers in existing §25.493 is adequate and appropriate and should not be changed.

ARM noted that the current rule requires a REP acquiring control of another REP to amend its certificate in a manner that demonstrates compliance with the rule. ARM also noted that if the party acquiring control in the transaction is not a REP, the acquiring party must obtain a new certificate, or amend the certificate that is transferred in the transaction, as is dictated by PURA §39.352.

ARM also recommended two additions to the current rule. First, ARM recommended that current subsection (i)(3) include a notice requirement for those instances in which a change in control of a REP does not trigger a certificate amendment. ARM noted that every change in control or ownership of a REP may not involve a material change and thus would not require a certificate amendment. ARM stated that these types of transactions could go unreported to the commission. Secondly, ARM suggested that subsection (i)(3) be clarified to state that a REP may seek preapproval of a certificate amendment based on a material change in information, including a change in control.

In reply comments, ARM provided proposed language to effectuate the two additions that ARM recommended in its initial comments.

TEAM commented that requiring preapproval of a change in control sends a signal that there is regulatory risk to investing in Texas in that a sale cannot be completed without approval from a state regulatory body. TEAM also stated that no such preapprovals are required in other jurisdictions that are open to retail electric competition.

Four TDUs commented that this rulemaking closes the gap in the regulatory framework that allows a REP to avoid the screening that occurs when an entity applies for a new REP certificate by purchasing an existing REP certificate. They also noted that after-the-fact reporting of changes in control are not effective, because removing a REP who does not meet required standards can be a long process during which the REP's customers and other market participants are at risk.

In reply comments, Three TDUs suggested that a pre-approval requirement is no more of a barrier to entry than that applicable to anyone seeking a new REP certificate, and that there is no rational basis for declining to apply the same standards to an entity entering the market in some other way. Moreover, Three TDUs noted that preapproval actually decreases the risk for potential investors or new entrants because with preapproval, a buyer will not subject itself to decertification if it finds after the deal closes that it does not or cannot meet the requirements of the rule. In reply comments, TXU stated that it supported the comments filed by ARM, Reliant and TEAM.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (i)(3)(A)(i)

TXU noted that the commission could require pre-approval for a direct transfer of a REP certificate that would result in a new, previously un-certificated entity providing retail electric service, if the commission determines such requirement is preferable to the existing post-transfer notice and amendment requirements. TXU proposed language to implement its comments regarding this provision.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (i)(3)(A)(ii)

TXU specifically commented on §25.107(i)(3)(A)(ii), and reiterated that TXU believes the proposed changes exceed the commission's authority and are unnecessary. TXU noted that an existing REP's acquisition of customers through a transfer of customers from another REP is presently addressed by §25.493. Furthermore, TXU stated that to the extent this provision would capture the transfer of a REP certificate, it is already covered by the amendment process in current §25.107, as well as by proposed subsection (i)(3)(A)(i). Thus, TXU believes this provision should be deleted.

Reliant, TEAM, and ARM noted that the commission modified this rule recently and that there is no compelling reason to do so again at this time. Specifically, TEAM commented that some experience with the current rules is required before major changes are made. In reply comments, Three TDUs noted that the prior project in which this rule was amended did not address the issue of transfers, and that it is appropriate to take it up in this rulemaking.

Several commenters provided comments regarding the 75-day timeline for review of an application for a change in control. These comments are summarized and addressed in response to Question No. 1 above.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (i)(3)(B) - (E)

Four TDUs suggested that the commission should require both the existing certificate holder and the entity seeking to assume control to participate in the process for seeking approval of a change of control and to be clear in the rule about which requirements apply to each. Four TDUs provided language to effectuate their proposed changes and suggested differentiating between the "transferring applicant" and the "acquiring applicant."

In reply comments, ARM commented that the Four TDUs' suggested changes would require a transferring applicant to provide a substantially greater degree of information and proof than proposed subsection (i)(3) requires in order to obtain preapproval. ARM stated that the scope of requirements in this proposed subsection by Four TDUs is significant, going far beyond a demonstration of continued compliance with the certification rule's requirements.

Reliant and TEAM, in reply comments, expressed opposition to the changes proposed by Four TDUs. TEAM noted that the Four TDUs did not acknowledge the recent changes to the REP certification rule that provide additional financial safeguards to the TDUs. Reliant described the suggested changes as a burdensome regulatory process, which would provide no real benefit.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (i)(6)

Four TDUs stated that a REP that is ceasing operations should be required to satisfy its obligations to all market participants, not just its retail customers, and provided language to effectuate this change. Four TDUs suggested rule language that would require the REP to provide proof of satisfaction of all of its financial obligations to ERCOT and TDUs.

Commission Response

The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.

Subsection (j)

OPC reiterated its opposition to switch-holds. However, if the commission implements a switch-hold provision in its rules, then to the extent a REP has erroneously applied a switch-hold, the erroneous switch-hold constitutes a violation and should be cause for suspension or revocation of a REP certificate.

TXU proposed to require that this section apply to switch-holds that were willfully or intentionally misapplied, since the result of a violation as proposed is a fine of $25,000 per violation per day or suspension or revocation of a REP certificate. Cities disagreed with TXU's suggestion. Cities opined that erroneous switch-holds are a danger inherent in authorizing any switch-holds and the practice of instituting switch-holds is likely to result in erroneous switch-holds due to human error or deficient business processes. Since a switch-hold is the harshest penalty that a REP can impose on a customer, from the perspective of the customer, a wrongful switch-hold imposed by a REP due to error or poor business process is no less harmful than one intentionally imposed without justification. Whether the switch-hold is erroneous or intentional, the result is the same. The Cities recommended no change to the rule as proposed.

Commission Response

The commission disagrees with TXU that only switch-holds that were intentionally and willfully misapplied should be subject to the consequences of subsection (j). Adding a requirement of intentional and willful misapplication would not provide sufficient incentive for companies to build systems and processes to ensure that switch-holds are applied only to customers that are subject to the switch-hold and are removed within the prescribed timeline. The commission agrees with Cities that whether the switch-hold is inadvertent or intentional, the harm is the same from the perspective of the customer. Therefore, the commission declines to adopt TXU's proposed changes. The commission modifies the language as to when a violation of a switch-hold occurs to be consistent with §25.480 as recently amended by the commission in Project Number 36131.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This amendment is adopted under PURA §14.002, which requires the commission to adopt rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.352, which requires the commission to certify a person as a REP if the person demonstrates, among other things, the financial and technical resources to provide continuous and reliable electric service, the managerial and technical ability to supply electricity at retail in accordance with customer contracts, and the resources needed to meet customer protection requirements and which requires a person applying for certification as a REP to comply with all customer protection provisions, disclosure requirements, and marketing guidelines established by the commission and PURA; PURA §17.004, which authorizes the commission to adopt and enforce rules concerning REPs that protect customers against fraudulent, unfair, misleading, deceptive, or anticompetitive practices and that impose minimum service standards relating to customer deposits and termination of service; PURA §§17.051 - 17.053, which authorize the commission to adopt rules for REPs concerning certification, changes in ownership and control, customer service and protection, and reports; and PURA §39.101, which authorizes the commission to adopt and enforce rules that ensure retail customer protections that entitle a customer: to safe, reliable, and reasonably priced electricity, to have access to on-site distributed generation and to providers of energy generated by renewable energy resources, to other information or protections necessary to ensure high-quality service to customers including protections relating to customer deposits and quality of service, and to be protected from unfair, misleading, or deceptive practices, and which requires the commission to ensure that its customer protection rules provide at least the same level of customer protection against potential abuses and the same quality of service that existed on December 31, 1999.

Cross Reference to Statutes: PURA §§14.002, 17.004, 17.051 - 17.053, 39.101, and 39.352.

§25.107. Certification of Retail Electric Providers (REPs).

(a) Applicability. This section applies to all persons who provide or seek to provide electric service to retail customers in an area in which customer choice is in effect and to retail customers participating in a customer choice pilot project authorized by the commission. This section does not apply to the state, political subdivisions of the state, electric cooperatives or municipal corporations, or to electric utilities providing service in an area where customer choice is not in effect. An electric cooperative or municipally owned utility participating in customer choice may offer electric energy and related services at unregulated prices directly to retail customers who have customer choice without obtaining certification as a REP.

(1) A person must obtain a certificate pursuant to this subsection before purchasing, taking title to, or reselling electricity in order to provide retail electric service.

(2) A person who does not purchase, take title to, or resell electricity in order to provide electric service to a retail customer is not a REP and may perform a service for a REP without obtaining a certificate pursuant to this section.

(3) A REP that outsources retail electric functions remains responsible under commission rules for those functions and remains accountable to applicable laws and commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity.

(4) All filings made with the commission pursuant to this section, including a filing subject to a claim of confidentiality, shall be filed with the commission's Filing Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and other Documents).

(b) Definitions. The following words and terms when used in this section shall have the following meaning unless the context indicates otherwise:

(1) Affiliate--An affiliate of, or a person affiliated with, a specified person, is a person that directly, or indirectly through one

or more intermediaries, controls or is controlled by, or is under the common control with, the person specified.

(2) Continuous and reliable electric service--Retail electric service provided by a REP that is consistent with the customer's terms and conditions of service and uninterrupted by unlawful or unjustified action or inaction of the REP.

(3) Control--The term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise.

(4) Customer--Any entity who has applied for, has been accepted for, or is receiving retail electric service from a REP on an end-use basis.

(5) Default--As defined in a transmission and distribution utility (TDU) tariff for retail delivery service, Electric Reliability Council of Texas (ERCOT) qualified scheduling entity (QSE) agreement, or ERCOT load serving entity (LSE) agreement.

(6) Executive officer--When used with reference to a person means its president or chief executive officer, a vice president serving as its chief financial officer, or a vice president serving as its chief accounting officer, or any other officer of the person who performs any of the foregoing functions for the person.

(7) Guarantor--A person providing a guaranty agreement, business financial commitment, or a credit support agreement providing financial support to a REP or applicant for REP certification pursuant to this section.

(8) Investment-grade credit rating--A long-term unsecured credit rating of at least "Baa3" from Moody's Investors' Service, or "BBB-" from Standard & Poor's or Fitch, or "BBB" from A.M. Best.

(9) Permanent employee--An individual that is fully integrated into a REP's business organization. A consultant is not a permanent employee.

(10) Person--Includes an individual and any business entity, including and without limitation, a limited liability company, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative or a municipal corporation.

(11) Principal--A person or a member of a group of persons that controls the person in question.

(12) Retail electric provider--A person that sells electric energy to retail customers in this state. As provided in Public Utility Regulatory Act (PURA) §39.353(b), a REP is not an aggregator.

(13) Shareholder--The term shareholder means the legal or beneficial owner of any of the equity of any business entity, including without limitation and as the context and applicable business entity requires, stockholders of corporations, members of limited liability companies and partners of partnerships.

(14) Tangible net worth--Total shareholders' equity, determined in accordance with generally accepted accounting principles, less intangible assets other than goodwill.

(15) Working day--A day on which the commission is open for the conduct of business.

(c) Application for REP certification.

(1) A person applying for certification as a REP must demonstrate its capability of complying with this section. A person who operates as a REP or who receives a certificate under this section shall maintain compliance with this section.

(2) An application for certification shall be made on a form approved by the commission, verified by oath or affirmation, and signed by an executive officer of the applicant.

(3) Except where good cause exists to extend the time for review, the presiding officer shall issue an order finding whether an application is deficient or complete within 20 working days of filing. Deficient applications, including those without necessary supporting documentation, will be rejected without prejudice to the applicant's right to reapply.

(4) While an application for a certificate is pending, an applicant shall inform the commission of any material change in the information provided in the application within ten working days of any such change.

(5) Except where good cause exists to extend the time for review, the commission shall enter an order approving, rejecting, or approving with modifications, an application within 90 days of the filing of the application.

(d) REP certification requirements. A person seeking certification under this section may apply to provide services under paragraph (1) or (2) of this subsection, and shall designate its election in the application.

(1) Option 1. This option is for a REP whose service offerings will be defined by geographic service area.

(A) An applicant must designate one of the following categories as its geographic service area:

(i) The geographic area of the entire state of Texas;

(ii) A specific geographic area (indicating the zip codes applicable to that area);

(iii) The service area of specific TDUs or specific municipal utilities or electric cooperatives in which competition is offered; or

(iv) The geographic area of ERCOT or other independent organization to the extent it is within Texas.

(B) A REP with a geographic service area is subject to all subsections of this section, including those pertaining to basic, financial, technical and managerial, customer protection, and reporting and changing certification requirements.

(C) The commission shall grant a certificate to an applicant proposing to provide retail electric service to a geographic service area in Texas if it demonstrates that it meets the requirements of this section.

(D) The commission shall deny an application if the configuration of the proposed geographic area would discriminate in the provision of electric service to any customer because of race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, or familial status; because the customer is located in an economically distressed geographic area or qualifies for low income affordability or energy efficiency services; or because of any other reason prohibited by law.

(2) Option 2. This option is for a REP whose service offerings will be limited to specifically identified customers, each of whom contracts for one megawatt or more of capacity. The applicant shall be certified as a REP only for purposes of serving the specified customers. The commission shall grant a certificate under this paragraph if the applicant demonstrates that it meets the requirements of this paragraph.

(A) A person seeking certification under this paragraph must file with the commission a signed, notarized affidavit from each customer, with whom it has contracted to provide one megawatt or more of capacity. The affidavit must state that the customer is satisfied that the REP meets the standards prescribed by PURA §39.352(b)(1) - (3) and (c).

(B) The following subsections apply to REPs certified pursuant to this paragraph:

(i) Subsection (e) of this section (relating to Basic Requirements);

(ii) Subsection (f)(5) of this section (relating to Billing and Collection of Transition Charges); and

(iii) Subsection (i) of this section (relating to Requirements for Reporting and Changing Certification).

(3) Option 3. This option is for a REP that sells electricity exclusively to a retail customer other than a small commercial and residential customer from a distributed generation facility located on a site controlled by that customer. The following subsections do not apply to REPs certified pursuant to this paragraph: subsections (f), (g), (h), and (i)(4) - (5) of this section, except that a person seeking certification under this paragraph shall file an application with the commission that identifies a power generation company that owns the distributed generation facilities and provides the information required in subsection (g)(2)(A) of this section. A person seeking certification under this paragraph shall ensure that the distributed generation facility from which it buys electricity is owned by a power generating company (PGC) that has registered in accordance with §25.109 of this title (relating to Registration of Power Generation Companies and Self Generators), and

(A) Conforms to the requirements of §25.211 of this title (relating to Interconnection of On-Site Distributed Generation (DG)) and §25.212 of this title (relating to Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation);

(B) Is installed by a Licensed Electrician, consistent with the requirements of the Texas Department of Licensing and Regulation; and

(C) Is installed in accordance with the National Electric Code as adopted by the Texas Department of Licensing and Regulation and in compliance with all applicable local and regional building codes.

(e) Basic requirements.

(1) Names on certificates. All retail electric service shall be provided under names set forth in the granted certificate. If the applicant is a corporation, the commission shall issue the certificate in the corporate name of the applicant.

(A) No more than five assumed names may be authorized for use by any one REP at one time.

(B) Business names shall not be deceptive, misleading, vague, otherwise contrary to §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates), or duplicative of a name previously approved for use by a REP certificate holder.

(C) If the commission determines that any requested name does not meet the requirements of subparagraph (B) of this paragraph, it shall notify the applicant that the requested name shall not be used by the REP. An application shall be dismissed if an applicant does not provide at least one suitable name.

(2) Office requirements. A REP shall continuously maintain an office located within Texas for the purpose of providing customer service, accepting service of process and making available in that office books and records sufficient to establish the REP's compliance with PURA and the commission's rules. The office satisfying this requirement for a REP shall have a physical address that is not a post office box and shall be a location where the above three functions can occur. To evaluate compliance with requirements in this paragraph, the commission staff may visit the office of a REP at any time during normal business hours. An applicant shall demonstrate that it has made arrangements for an office located in Texas.

(f) Financial requirements.

(1) Access to capital. A REP must meet the requirements of subparagraphs (A) or (B) of this paragraph.

(A) A REP or its guarantor electing to meet the requirements of this subparagraph must demonstrate and maintain:

(i) an investment-grade credit rating; or

(ii) tangible net worth greater than or equal to $100 million, a minimum current ratio (current assets divided by current liabilities) of 1.0, and a debt to total capitalization ratio not greater than 0.60, where all calculations exclude unrealized gains and losses resulting from valuing to market the power contracts and financial instruments used as supply hedges to serve load, and such calculations are supported by an affidavit from an executive officer of the REP attesting to the accuracy of the calculation.

(B) A REP electing to meet the requirements of this subparagraph must demonstrate shareholders' equity, determined in accordance with generally accepted accounting principles, of not less than one million dollars for the purpose of obtaining certification, and the REP or its guarantor must provide and maintain an irrevocable stand-by letter of credit payable to the commission with a face value of $500,000 for the purpose of maintaining certification.

(i) The required shareholders' equity of one million dollars shall be determined net of assets used for collateral pledged to secure the irrevocable stand-by letter of credit of $500,000.

(ii) For the period beginning on the date of certification and ending two years after the REP begins serving load, a REP shall not make any distribution or other payment to any shareholders or affiliates if, after giving effect to the distribution or other payment, the REP's shareholders' equity is less than one million dollars, net of assets used for collateral pledged to secure the irrevocable stand-by letter of credit of $500,000. The restriction on distributions or other payments contained in this subparagraph includes, but is not limited to, dividend distributions, redemptions and repurchases of equity securities, or loans to shareholders or affiliates.

(iii) A REP that began serving load on or before January 1, 2009 is not required to demonstrate the shareholders' equity required pursuant to subparagraph (B) of this paragraph, and is not subject to the restrictions on distributions or payments to shareholders or affiliates contained in subparagraph (B) of this paragraph.

(2) Protection of customer deposits and advance payments.

(A) A REP certified pursuant to paragraph (1)(A) of this subsection shall keep customer deposits and residential advance payments in an escrow account or segregated cash account, or provide an irrevocable stand-by letter of credit payable to the commission in an amount sufficient to cover 100% of the REPs outstanding customer deposits and residential advance payments held at the close of each month.

(B) A REP certified pursuant to paragraph (1)(B) of this subsection shall keep customer deposits and residential advance pay-

ments in an escrow account or segregated cash account, or provide an irrevocable stand-by letter of credit payable to the commission in an amount sufficient to cover 100% of the REP's outstanding customer deposits and residential advance payments held at the close of each month. For purposes of this subparagraph only, to qualify as a segregated cash account, the account must be with a financial institution whose deposits, including the deposits in the segregated cash account, are insured by the Federal Deposit Insurance Corporation, the account is designated as containing only customer deposits, the account is subject to the control or management of a provider of pervasive and comprehensive credit to the REP that is not affiliated with the REP, and the terms for managing the account protect customer deposits.

(C) In lieu of the requirements of subparagraph (B) of this paragraph, a REP certified pursuant to paragraph (1)(B) of this subsection that is providing electric service under the provisions of §25.498 of this title (relating to Retail Electric Service Using a Customer Prepayment Device or System) shall be required to keep all deposits and an amount sufficient to cover the credit balance that exceeds $50 for all customer accounts that have a credit balance exceeding $50 at the close of each month in an escrow account, or to provide an irrevocable stand-by letter of credit payable to the commission in an amount equal to or greater than the amount required to be deposited in the escrow account.

(D) Each escrow account and segregated cash account shall be reconciled no less frequently than at the close of each month to ensure that it equals or exceeds deposits and residential advance payments held as of the end of the month, and shall maintain at least that amount in the account until the next monthly reconciliation.

(E) Any irrevocable stand-by letter of credit provided pursuant to this paragraph shall be in addition to the irrevocable stand-by letter of credit required by paragraph (1)(B) of this subsection, if applicable.

(3) Protection of TDU financial integrity.

(A) A TDU shall not require a deposit from a REP except to secure the payment of transition charges as provided in §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding Billing and Collection of Transition Charges), or if the REP has defaulted on one or more payments to the TDU. A TDU may impose credit conditions on a REP that has defaulted to the extent specified in its statewide standardized tariff for retail delivery service and as allowed by commission rules.

(B) A TDU shall create a regulatory asset for bad debt expenses, net of collateral posted pursuant to subparagraph (A) of this paragraph and bad debt already included in its rates, resulting from a REP's default on its obligation to pay delivery charges to the TDU. Upon a review of reasonableness and necessity, a reasonable level of amortization of such regulatory asset shall be included as a recoverable cost in the TDU's rates in its next rate case or such other rate recovery proceeding as deemed necessary.

(4) Financial documentation required to obtain a REP certificate. The following shall be required to demonstrate compliance with the financial requirements to obtain a REP certificate.

(A) Investment-grade credit ratings shall be documented by reports of a credit reporting agency.

(B) Tangible net worth shall be documented by the audited financial statements of the REP or its guarantor for the most recently completed calendar or fiscal year, and unaudited financial statements for the most recently completed quarter. Audited financial statements shall include the accompanying notes and the independent auditor's report. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. Three consecutive months of monthly statements may be submitted in lieu of quarterly statements if quarterly statements are not available. The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission.

(C) Shareholders' equity shall be documented by the audited and unaudited financial statements of the REP for the most recent quarter. Audited financial statements shall include the accompanying notes and the independent auditor's report. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. Three consecutive months of monthly statements may be submitted in lieu of quarterly statements if quarterly statements are not available. The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission.

(D) Segregated cash accounts shall be documented by an account statement that clearly identifies the financial institution where the account holder maintains the account, and that clearly identifies the account as an account that is designated as containing only customer deposits and residential advanced payments. Segregated cash accounts shall be maintained at a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation.

(E) Escrow accounts shall be documented by the current account statement and the escrow account agreement. The escrow account agreement shall provide that the account holds customer deposits and residential advance payments only, and that the deposits are held in trust by the escrow agent and are not the property of the REP or in the REP's control unless the customer deposits are applied to a final bill or applied to satisfy unpaid amounts if allowed by the REP's terms of service. The escrow agent shall deposit the customer deposits and residential advance payments in an account at a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation.

(F) Irrevocable stand-by letters of credit provided pursuant to paragraphs (1) or (2) of this subsection must be issued by a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation. The REP must use the standard form irrevocable stand-by letter of credit approved by the commission. The irrevocable stand-by letter of credit must be irrevocable for a period not less than twelve months, payable to the commission, and permit a draw to be made in part or in full. The irrevocable stand-by letter of credit must permit the commission's executive director or the designee to draw on the irrevocable stand-by letter of credit if:

(i) ERCOT performs a mass transition of the REP's customers; or

(ii) the commission issues an order revoking the REP's certificate.

(G) A REP may satisfy the requirements of paragraph (1)(A) of this subsection by relying upon a guarantor that meets one of the capital requirements of paragraph (1)(A) of this subsection, provided that:

(i) The guarantor is an affiliate of the REP and has executed and maintains the standard form guaranty agreement approved by the commission, or

(ii) The guarantor is one or more persons that are affiliates of the REP and such affiliates have executed and maintain guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with power purchase agreements and for security associated with participation at ERCOT, or

(iii) The guarantor is a financial institution that maintains an investment-grade credit rating and has executed and maintains guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with power purchase agreements and for security associated with participation at ERCOT, or

(iv) The guarantor is a provider of wholesale power supply to the REP, or one of such power provider's affiliates, and such person has executed and maintains guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with a power purchase agreement and for security associated with participation at ERCOT.

(5) Billing and collection of transition charges. If a REP serves customers in the service area of a TDU that is subject to a financing order pursuant to PURA §39.310, the REP shall comply with §25.108 of this title.

(6) Proceeds from an irrevocable stand-by letter of credit.

(A) Proceeds from an irrevocable stand-by letter of credit provided under this subsection may be used to satisfy the following obligations of the REP, in the following order of priority:

(i) first, to pay the deposits to retail electric providers that volunteer to provide service in a mass transition event under §25.43 of this title (relating to Provider of Last Resort) of low income customers enrolled in the system benefit fund rate reduction program pursuant to §25.454(f) of this title (relating to Rate Reduction Program);

(ii) second, to pay the deposits to retail electric providers that do not volunteer to provide service in a mass transition event under §25.43 of this title of low income customers enrolled in the system benefit fund rate reduction program pursuant to §25.454(f) of this title;

(iii) third, for customer deposits and residential advance payments of customers that did not benefit from clause (i) or (ii) of this subparagraph;

(iv) fourth, for services provided by the independent organization related to serving customer load;

(v) fifth, for services provided by a TDU; and

(vi) sixth, for administrative penalties assessed under Chapter 15 of PURA.

(B) Proceeds from an irrevocable stand-by letter of credit provided under this subsection shall, to the extent that the proceeds are not needed to satisfy an obligation set out in subparagraph (A) of this paragraph, be paid to the REP.

(g) Technical and managerial requirements. A REP must have the technical and managerial resources and ability to provide continuous and reliable retail electric service to customers, in accordance with its customer contracts, PURA, commission rules, ERCOT protocols, and other applicable laws.

(1) Technical and managerial resource requirements include:

(A) Capability to comply with all applicable scheduling, operating, planning, reliability, customer registration, and settlement policies, protocols, guidelines, procedures, and other rules established by ERCOT or other applicable independent organization including any independent organization requirements for 24-hour coordination with control centers for scheduling changes, reserve implementation, curtailment orders, interruption plan implementation, and telephone number, fax number, e-mail address, and postal address where the REP's staff can be directly reached at all times.

(B) Capability to comply with the registration and certification requirements of ERCOT or other applicable independent organization and its system rules, or contracts for services with entities registered with or certified by ERCOT or other applicable independent organization.

(C) Compliance with all renewable energy portfolio standards in accordance with §25.173 of this title (relating to Goal for Renewable Energy).

(D) Principals or permanent employees in managerial positions whose combined experience in the competitive electric industry or competitive gas industry equals or exceeds 15 years. An individual that was a principal of a REP that experienced a mass transition of the REP's customers to POLR shall not be considered for purposes of satisfying this requirement, and shall not own more than 10% of a REP or directly or indirectly control a REP.

(E) At least one principal or permanent employee who has five years of experience in energy commodity risk management of a substantial energy portfolio. Alternatively, the REP may provide documentation demonstrating that the REP has entered into a contract for a term not less than two years with a provider of commodity risk management services that has been providing such services for a substantial energy portfolio for at least five years. A substantial energy portfolio means managing electricity or gas market risks with a minimum value of at least $10,000,000.

(F) Adequate staffing and employee training to meet all service level commitments.

(G) The capability and effective procedures to be the primary point of contact for retail electric customers for distribution system service in accordance with applicable commission rules, including procedures for relaying outage reports to the TDU on a 24-hour basis.

(H) A customer service plan that describes how the REP complies with the commission's customer protection and anti-discrimination rules.

(2) An applicant shall include the following in its initial application for REP certification:

(A) Prior experience of one or more of the applicant's principals or permanent employees in the competitive retail electric industry or competitive gas industry;

(B) Any complaint history, disciplinary record and compliance record during the 60 months immediately preceding the filing of the application regarding: the applicant; the applicant's affiliates that provide utility-like services such as telecommunications, electric, gas, water, or cable service; the applicant's principals; and any person that merged with any of the preceding persons;

(i) The complaint history, disciplinary record, and compliance record shall include information from any federal agency including the U.S. Securities and Exchange Commission; any self-regulatory organization relating to the sales of securities, financial instruments, or other financial transactions; state public utility commissions, state attorney general offices, or other regulatory agencies in states where the applicant is doing business or has conducted business in the past including state securities boards or commissions, the Texas Secretary of State, Texas Comptroller's Office, and Office of the Texas Attorney General. Relevant information shall include the type of complaint, status of complaint, resolution of complaint, and the number of customers in each state where complaints occurred.

(ii) The applicant may request to limit the inclusion of this information if it would be unduly burdensome to provide, so long as the information provided is adequate for the commission to assess the applicant's and the applicant's principals' and affiliates' complaint history, disciplinary record, and compliance record.

(iii) The commission may also consider any complaint information on file at the commission.

(C) A summary of any history of insolvency, bankruptcy, dissolution, merger, or acquisition of the applicant or any predecessors in interest during the 60 months immediately preceding the application;

(D) A statement indicating whether the applicant or the applicant's principals are currently under investigation or have been penalized by an attorney general or any state or federal regulatory agency for violation of any deceptive trade or consumer protection laws or regulations;

(E) Disclosure of whether the applicant or applicant's principals have been convicted or found liable for fraud, theft, larceny, deceit, or violations of any securities laws, customer protection laws, or deceptive trade laws in any state;

(F) An affidavit stating that the applicant will register with or be certified by ERCOT or other applicable independent organization and will comply with the technical and managerial requirements of this subsection; or that entities with whom the applicant has a contractual relationship are registered with or certified by the independent organization and will comply with all system rules established by the independent organization; and

(G) Other evidence, at the discretion of the applicant, supporting the applicant's plans for meeting requirements of this subsection.

(h) Customer protection requirements. A REP shall comply with all applicable customer protection requirements, including disclosure requirements, marketing guidelines and anti-discrimination requirements, and the requirements of this section.

(i) Requirements for reporting and changing certification. To maintain a REP certificate, a REP must keep its certification information up to date, pursuant to the following requirements:

(1) A REP shall notify the commission within five working days of any change in its business address, telephone numbers, authorized contacts, or other contact information.

(2) A REP that demonstrates compliance with certification requirements of this section by submitting an affidavit shall supply information to the commission to show actual compliance with this section.

(3) A REP shall apply to amend its certification within ten working days of a material change to the information provided as the basis for the commission's approval of the certification application. A REP may seek prior approval of a material change, including a change in control, by filing the amendment application before the occurrence of the material change. The transfer of a REP certificate is a material change.

(4) For an Option 1 REP, the REP shall notify the commission within three working days of its non-compliance with subsection (f)(1)(A) or (B) of this section. The notification shall set out a plan of recourse to correct the non-compliance with subsection (f)(1)(A) or (B) of this section within 10 working days after the non-compliance has been brought to the attention of the commission. The commission staff may initiate a proceeding to address the non-compliance.

(5) For an Option 1 REP, the REP shall file a report due on March 5, or 65 days after the end of the REP or guarantor's fiscal year (annual report), and August 15, or 225 days after the end of the REP or guarantor's fiscal year (semi-annual report), of each year.

(A) The annual report shall include:

(i) Any changes in addresses, telephone numbers, authorized contacts, and other information necessary for contacting the certificate holder.

(ii) Identification of areas where the REP is providing retail electric service to customers in Texas compiled by zip code.

(iii) A list of aggregators with whom the REP has conducted business in the reporting period, and the commission registration number for each aggregator.

(iv) A sworn affidavit that the certificate holder is not in material violation of any of the requirements of its certificate.

(v) Any changes in ownership.

(vi) Any changes in management, experience, and personnel relied on for certification in each semi-annual report before the REP begins serving customers and in the first semi-annual report after the REP serves customers.

(vii) Documentation to demonstrate ongoing compliance with the financial requirements of subsection (f) of this section, including, but not limited to, calculations showing tangible net worth, financial ratios or shareholders' equity, as applicable, and the amount of customer deposits and the balance of an account in which customer deposits are held, supported by a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided. Any certified calculations provided as part of the annual report to demonstrate such compliance shall be as of the end of the most recent fiscal quarter. A REP may submit any relevant documentation of the type required by subsection (f)(4) of this section to demonstrate its ongoing compliance with the financial requirements of subsection (f) of this section.

(B) The semi-annual report shall include:

(i) Documentation to demonstrate ongoing compliance with the financial requirements of subsection (f) of this section, including, but not limited to, calculations showing tangible net worth, financial ratios or shareholders' equity, as applicable, and the amount of customer deposits and the balance of an account in which customer deposits are held, and shall be supported by a sworn statement from an

executive officer of the REP attesting to the accuracy of the information provided. Any certified calculations provided as part of the semi-annual report to demonstrate such compliance shall be as of the end of the most recent fiscal year and most recent fiscal quarter. A REP may submit any relevant documentation of the type required by subsection (f)(4) of this section to demonstrate its ongoing compliance with the financial requirements of subsection (f) of this section.

(ii) The audited financial statements of the REP or its guarantor for the most recent completed calendar or fiscal year with accompanying footnotes and the independent auditor's report, if not previously filed.

(iii) The unaudited financial statements for the most recent six-month financial period that immediately follows the end of its most recent fiscal year. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. In lieu of six-month unaudited financial statements, six consecutive months of monthly financial statements may be submitted.

(C) The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission. A REP that is part of a structure that is consolidated for financial reporting purposes and files financial reports with a federal agency on a consolidated company basis may provide financial statements for the consolidated company to meet this requirement.

(D) REPs or guarantors with an investment-grade credit rating are not required to provide financial statements pursuant to this section.

(6) A REP shall not cease operations as a REP without prior notice of at least 45 days to the commission, to each of the REP's customers to whom the REP is providing service on the planned date of cessation of operations, and to other affected persons, including the applicable independent organization, TDUs, electric cooperatives, municipally owned utilities, generation suppliers, and providers of last resort. The REP shall file with the commission proof of refund of any monies owed to customers. Upon the effective cessation date, a REP's certificate will be suspended. A REP must demonstrate full compliance with the requirements of this section, including but not limited to, the requirement to demonstrate shareholders' equity of not less than one million dollars and its associated restrictions pursuant to subsection (f)(1)(B) of this section, in order for the commission to reinstate the certificate. The commission may revoke a suspended certificate if it determines that the REP does not meet certification requirements.

(7) If a REP files a petition in bankruptcy, is the subject of an involuntary bankruptcy proceeding, or in any other manner becomes insolvent, it shall notify the commission within three working days of this event and shall provide the commission a summary of the nature of the matter. The commission shall have the right to proceed against any financial resources that the REP relied on in obtaining its certificate, to satisfy unpaid obligations to customers or administrative penalties.

(8) A REP shall respond within three working days to any commission staff request for additional information to confirm continued compliance with this section.

(j) Suspension and revocation. A certificate granted pursuant to this section is subject to amendment, suspension, or revocation by the commission for a significant violation of PURA, commission rules, or rules adopted by an independent organization. A suspension of a REP certificate requires the cessation of all REP activities associated with obtaining new customers in the state of Texas. A revocation of a REP certificate requires the cessation of all REP activities in the state of Texas, pursuant to commission order. The commission may also impose an administrative penalty on a person for a significant violation of PURA, commission rules, or rules adopted by an independent organization. The commission staff or any affected person may bring a complaint seeking to amend, suspend, or revoke a REP's certificate. Significant violations include the following:

(1) Providing false or misleading information to the commission;

(2) Engaging in fraudulent, unfair, misleading, deceptive, or anticompetitive practices, or unlawful discrimination;

(3) Switching, or causing to be switched, the retail electric provider for a customer without first obtaining the customer's permission;

(4) Billing an unauthorized charge, or causing an unauthorized charge to be billed, to a customer's retail electric service bill;

(5) Failure to maintain continuous and reliable electric service to customers pursuant to this section;

(6) Failure to maintain financial resources in accordance with subsection (f) of this section;

(7) Bankruptcy, insolvency, or the inability to meet financial obligations on a reasonable and timely basis;

(8) Failure to timely remit payment for invoiced charges to an independent organization;

(9) Failure to observe any applicable scheduling, operating, planning, reliability, and settlement policies, protocols, guidelines, procedures, and other rules established by the independent organization;

(10) A pattern of not responding to commission inquiries or customer complaints in a timely fashion;

(11) Suspension or revocation of a registration, certification, or license by any state or federal authority;

(12) Conviction of a felony by the certificate holder, a person controlling the certificate holder, or principal employed by the certificate holder, or any crime involving fraud, theft, or deceit related to the certificate holder's service;

(13) Not providing retail electric service to customers within 24 months of the certificate being granted by the commission;

(14) Failure to serve as a provider of last resort if required to do so by the commission;

(15) Providing retail electric service in an area in which customer choice is in effect without obtaining a certificate under this section;

(16) Failure to timely remit payment for invoiced charges to a transmission and distribution utility pursuant to the terms of the statewide standardized tariff adopted by the commission;

(17) Erroneously imposing switch-holds or failing to remove switch-holds within the timeline described in §25.480 of this title (relating to Bill Payment and Adjustments); and

(18) Other significant violations, including the failure or a pattern of failures to meet the requirements of this section or other commission rules or orders.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 3, 2010.

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Adriana A. Gonzales
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Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.505

The Public Utility Commission of Texas (commission) adopts an amendment to §25.505, relating to Resource Adequacy in the Electric Reliability Council of Texas Power Region, with changes to the proposed text as published in the September 3, 2010, issue of the *Texas Register* (35 TexReg 8032).

The amendment addresses the timing for release of transmission system information contained in the Electric Reliability Council of Texas (ERCOT) State Estimator Report (SER). The timing and contents of the data released provide the market transparency that ensures better market operation and results, while recognizing and respecting the need for the protection of resource-specific output levels and offer curves. The timing of the release of this information is instrumental to ensuring safe, reliable, and reasonably priced electricity in the competitive market while protecting the confidentiality of competitively sensitive information. Additionally, this amendment clarifies the protection of consumption information from facilities whose competitively sensitive information is provided to ERCOT for grid reliability. This amendment will provide ERCOT the latitude to release to the public relevant State Estimator data, as appropriate, to assist in the explanation and understanding of unusual and significant events and market results. Additionally, the amendment directs ERCOT to develop a redacted SER that can be released sooner than the full report by excluding the portions of the full report that would release competitively sensitive information. The amendment to §25.505 is a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). The amendment is adopted under Project Number 38470.

The commission received initial comments on the proposed amendment from Joint Commenters; South Texas Electric Cooperative, Inc. (STEC); Lower Colorado River Authority (LCRA); Potomac Economics (Potomac); Luminant Generation Company LLC and Luminant Energy Company LLC (Luminant); Texas Industrial Energy Consumers (TIEC); Calpine Corporation (Calpine); CPS Energy; and Electric Reliability Council of Texas (ERCOT). Joint Commenters consisted of Exelon Generation Company, LLC; International Power America; NRG Texas LLC; Shell Energy North America (US); and Topaz Power Holdings, LLC. Potomac currently is the ERCOT independent market monitor (IMM). The commission received reply comments from Calpine, Joint Commenters, Luminant, CPS Energy, and ERCOT. The commission did not receive a request for a public hearing, but did obtain oral comments from ERCOT, the IMM, Luminant, Joint Commenters, and CPS Energy before adopting the amendment.

Release of State Estimator Data

Joint Commenters and Calpine argued that the commission should reject the amendment and maintain the 60-day release period for the SER. They believed that the amendment would reopen a previously debated commission rule (see Project Numbers 33490 and 31972). They expressed the view that the current rule has already established the proper mechanism to balance the competing mandates of transparency and competition. Joint Commenters stated that the disclosure period should be at least 60 days, because most market participants in the prior rulemaking urged a disclosure period of at least three months. They explained that a 14-day period is too brief because the information is likely to be released while similar market circumstances still prevail, such as electricity demand levels, fuel supply, and fuel prices. Also, some planned outages and occasionally forced outages surpass 14 days in duration, and a release within this period would reveal these outages.

Joint Commenters, Calpine, and STEC expressed the view that the SER information should be available immediately to the IMM, ERCOT staff, commission staff, the Texas Regional Entity (TRE), and transmission service providers to monitor market behavior, ensure reliability, and allow the market operator to model the system properly. The IMM agreed that it is ERCOT's responsibility to ensure that its system operations are conducted in accordance with the ERCOT Protocols, and other data that are being released will enable market participants to detect potential problems that can be quickly communicated to ERCOT for investigation. The IMM contended that having the information at issue released after 60 days rather than after 14 days would not affect market participants' ability to bring problems to the attention of the IMM and the commission.

Joint Commenters stated that PURA §39.151 and §39.1515 refute any contention that the IMM and the commission's monitoring and enforcement should be supplemented through release of competitively sensitive information to market participants. Joint Commenters and Calpine claimed the 14-day release of information would invite gaming and other market manipulation, and this would put a greater strain on IMM and commission resources used in monitoring and enforcement.

Joint Commenters and Calpine stated that market participants already have access to useful data and under the Protocols have access to substantial amounts of additional data. The IMM concurred, explaining that the early release of the SER might be useful in understanding events that occur in the market and to confirm the market is operating correctly, but pointed to the extensive data that will be published by ERCOT in or near real time that will also be useful in understanding market operations and results. The IMM stated that such data include: locational marginal prices (LMPs) at every electrical bus and settlement point; a full transmission network model; planned and actual transmission outages; binding transmission constraint limits, flows, and shadow prices; hourly load and wind forecasts; and real-time load, wind production, and reserve levels, among many other items.

Joint Commenters, Calpine, and STEC claimed that the information at issue would allow for reverse-engineering that could reveal offer curves, which the current rule states are released only after 60 days. STEC stated that it is unlikely that smaller market

participants would benefit from the posting of such information, because the cost of the software to use the SER data would not be justified. In contrast, larger market participants could use the information to maximize their profits and also to manipulate the market. Calpine explained that the anticompetitive consequence of the amendment is an increased risk that market participants unwittingly could engage in tacit collusion.

Calpine stated that the ERCOT stakeholder process is better suited for the development of disclosure protocols. It expressed the view that §25.505(f) provides ERCOT with broad and clear rules regarding the disclosure of resource-specific data in the nodal market, and §25.505(h) requires ERCOT to "use a stakeholder process to develop protocols that comply with" the commission's rules. Calpine stated that the amendment gets this backwards; that is, the ERCOT stakeholder process is the appropriate forum to develop protocols for the release of the State Estimator's resource-specific data. It stated that in the existing rule the commission has done its job providing ERCOT stakeholders with broad and clear guidance regarding the treatment of resource-specific information, and it is this type of "in the weeds" task that is intended for the ERCOT stakeholder process.

Joint Commenters stated that the amendment adds a new term, *State Estimator Report,* but does not define it. They explained that *State Estimator Report* is not a commonly understood term and if the commission adopted the amendment without defining it, ERCOT could change the disclosure periods in the commission rule simply by changing the information it includes in the SER. Joint Commenters claimed that using the Nodal Protocols' current scope of information included in the SER would still require release after 60 days. They stated that the current rule language prescribes a 60-day period before public disclosure of "Other resource-specific information, as well as ... actual resource output, for each type of service and for each resource at each settlement point." Joint Commenters claimed that the information at issue is "other resource-specific information" and that it reveals "actual resource output, for each type of service and for each resource at each settlement point."

Joint Commenters offered legal arguments that the commission is required to protect competitively sensitive information pursuant to four sources of law: PURA, the Public Information Act (PIA), Texas law on privilege, and constitutional protections. They stated that the commission cannot exceed its authority under PURA §§14.154, 17.051, 39.001(b), 39.155(a), and 39.351 to adopt rules that would allow ERCOT to release competitively sensitive information that the commission itself could not release under PURA, PIA, and other law. Calpine stated that the Legislature has made policy decisions regarding the operation of the competitive market in PURA. It stated that the Legislature has given the commission the duty to protect market participants' competitively sensitive information.

Joint Commenters cited a case involving the Garland municipal utility that holds that the commission's broad discretion to set policy regarding competitive markets is limited by the PIA and PURA provisions protecting competitively sensitive information. They stated that differences in disclosure timeframes would conflict with the statutory directives regarding discrimination among market participants. Joint Commenters point out that entities like LCRA, CPS Energy, and Austin Energy are competitors in the wholesale power market and although the most recent version of §25.505(f)(3) was not appealed, public power utilities have already appealed two commission competition rules to enforce their PIA §552.133 rights. Joint Commenters stated that discrimination and anticompetitive concerns about the amendment not applying to publicly-owned wholesale power suppliers while applying to their privately-owned competitors are reasons the commission should reject the amendment.

STEC opposed the posting of the SER any earlier than 30 days. CPS Energy also expressed the view that unit-specific State Estimator data should be kept confidential for 30 days, but it supported the earlier release of a non-unit-specific SER. STEC stated that the further out the data are released, the closer the market is to another weather season and thus a different generation dispatch pattern. STEC stated that the risks of early release out-weigh any benefits that could possibly occur from the release of the information earlier than 30 days.

The IMM commented that the only reason §25.505(f)(3)(B) delays the release of this data for 60 days is to minimize the harm to the competitive market from earlier release. The IMM pointed to the competitive concerns previously raised by TXU Wholesale, Luminant's predecessor, regarding release of competitively sensitive information. It stated that the proposed 14-day release of the SER would result in direct and indirect release of data that are otherwise not released for 60 days pursuant to existing sections of §25.505 that remain unchanged. Joint Commenters offered three exhibits that it stated showed that Luminant or TXU Wholesale has previously argued that certain information was competitively sensitive, which is in contrast to the position Luminant has taken in this rulemaking.

Luminant stated that the release of the SER would not result in release of the same information that it was concerned about in 2006, and the wholesale market will be different than was conceived in 2006. Luminant stated that knowing generation status does not provide insight into a company's bidding behavior. Luminant's primary former concern is not implicated by the release of the SER. It stated that SER release has always included a delay component so that it has never been possible to observe critical information in real time. Luminant stated that the SER is not real time data because it represents an estimate at a point in time and is posted only on an hourly interval. Luminant stated that even if it were made immediately available, a significant amount of analysis time would be necessary if the SER were to be used for the purpose of determining generating outputs. Luminant stated that it does not support the publication of proprietary confidential information and continued to stand by its position in Project Number 31972, but that the SER will not result in the release of the same data.

The IMM stated that the systematic release of the SER should remain consistent with the existing 60-day timelines in §25.505. The IMM and CPS Energy supported an exception that would allow ERCOT to release transmission flow and resource output data that would otherwise be protected for 60 days on a much shorter timeline, on a limited basis determined by ERCOT, as necessary to provide explanations of market operations and events in a public forum to ERCOT stakeholders. Joint Commenters supported the IMM's recommendation for an appropriate, limited release; they offered rule language setting out a standard for the exception.

Calpine expressed concern with the lack of detail of the IMM's and CPS Energy's proposals for allowing ERCOT, on a limited basis, to release a limited SER, and therefore did not support it at this time. Luminant stated that the limited release of information is insufficient and inefficient, and stated that if the SER is not released, market participants will ask ERCOT for explanations and information whenever unexpected results occur, requiring

ERCOT to devote significant resources to responding to these requests.

ERCOT, regarding the limited release of SER data on a shorter timeline, as discussed by the IMM and CPS Energy, stated that it supported the general concept, but did not have enough time to develop criteria for the release. ERCOT stated that it would prefer to work with stakeholders and commission staff to develop the criteria for such disclosure, to protect competitively sensitive information.

LCRA and CPS Energy agreed that a subset of transmission line flows and transformer flows posted as part of the SER may be used to calculate resource output. CPS Energy stated that this information combined with nodal prices would allow for the extrapolation of generation offers. LCRA explained that it prefers a 48-hour lag for the posting of State Estimator flows that could be used to calculate resource output. It stated that delaying the SER data by two days would insulate entities that find themselves in a vulnerable position in the market.

LCRA and CPS Energy stated that they could compromise with the 14-day release time frame. LCRA still expressed a preference for the real-time release of voltages and tap positions and flows that cannot be used to calculate resource-specific output. LCRA proposed changes to the amendment language that would create a redacted SER that would be released every hour.

Luminant supported LCRA's redacted SER real-time release. It agreed with LCRA that the full SER report should be released within 48 hours. Luminant stated that ERCOT staff would not be able to implement the redaction of data from the SER before the Nodal Go Live date and therefore Luminant is willing to help find a procedure to achieve this before that date.

ERCOT explained that the concept of a redacted SER as proposed by LCRA would create an additional nodal system impact. The redacted SER would create abridged and unabridged versions of SER data on different timelines for release. ERCOT would need to evaluate potential system impacts of this proposal. It expressed the view that a redacted SER could not be scoped and implemented before Nodal Go Live.

Luminant stated that more timely information from the SER would help reduce modeling errors that lead to inappropriate pricing outcomes. According to Luminant, the appropriate balance is reflected in the existing ERCOT Nodal Protocols and that if a delay in release of the SER is necessary, it should be no more than 48 hours. Luminant stated that its conclusion was based upon its understanding of the market structure and the potential results of the market operating 14 days with errors that could be more quickly identified and corrected with the information contained in the SER.

Luminant argued that while concerns remain that SER data might be used to determine generation station status and output, these data are already being monitored by third-party commercial vendors, such as Genscape, in real time and are made available through for-profit services. Therefore, Luminant and LCRA favored a shorter release period for the SER, to level the playing field by making this information available to all market participants.

Joint Commenters and Calpine explained that information currently available from private services can be inaccurate and may not be available for some units, while the SER information would provide new insights into all plants, and would do so ERCOT-wide, uniformly formatted, in a reliable and predictable way. They stated that the fact that a limited, less accurate set of resource status and output information is prepared and sold commercially proves such information has value, and premature release of information might expose ERCOT to involvement in potential litigation if a market participant were harmed by the release of the data. Joint Commenters stated that if the information at issue were already available, there would be no need for the amendment. Joint Commenters and Calpine reiterated that the information available is not as comprehensive or accurate, and information on some resources operated by Calpine, STEC, and the Joint Commenters is not available.

Luminant stated that it would be difficult to determine a scenario where inappropriate market conduct could result from the release of the SER. It offered a demonstration of the information available and what could be reasonably gleaned from it. Luminant pointed out that the majority of offers accepted into the day-ahead market from specific resources cannot be changed in real time, and therefore the nodal market process itself would prevent any generation resource from changing an offer curve.

Luminant stated that other nodal markets have an after-the-fact mechanism to revise pricing based upon deviations and problems that arise in market models and solutions, while in ERCOT market prices can be altered only by an action of the ERCOT Board of Directors. Luminant stated that this places added importance on market transparency. Luminant stated that if the proposed 14-day time frame is instituted, market participants could gain or lose millions of dollars because of model errors that could have been readily addressed. Luminant stated that with no mechanism in the ERCOT market to mitigate the financial distortions resulting from congestion modeling errors, financial loss is permanent. It expressed the view that access to the SER data may be the most effective mitigation mechanism in the ERCOT market; and access to information would permit modeling errors to be identified and eliminated.

Joint Commenters refuted Luminant's argument that market harm cannot occur because the majority of offers accepted into the day-ahead market from specific resources cannot be changed in real time. They noted that this argument focuses on short-term harm and ignores all of the ways that a market participant can be harmed in the near and distant future by competitors' gaining insights into how its units are operating.

Luminant stated that stakeholders in any new market benefit when market participants have the opportunity to observe the market's actual operation and that unintended consequences can occur when a new market structure is launched. The earlier the unintended consequences are identified, the more quickly steps can be taken to address them. To make this point, Luminant offered three examples of actual model errors that would adversely impact the market. Luminant stated that these examples demonstrate that transparency into system conditions (e.g., forced transmission outages, distance from line, voltage, and contingency limits) will contribute to efficiency in the market.

ERCOT stated that it does not agree with all of Luminant's characterizations of the three examples and offered a clarification. Joint Commenters stated that every example of model errors Luminant cited could have been identified by using the data available to market participants that were listed in the IMM's comments. They also stated that no market participant has demonstrated that any shorter release period would be adequate to avert competitive harm from release of this information. Calpine stated that the commission should show more regard for the con-

cerns of anticompetitive harm raised by market participants and disregard Luminant's three examples.

ERCOT stated that it has no position on when to disclose the SER. ERCOT's comments addressed the nodal system impacts of the amendment. It explained that the amendment would change the posting requirement; ERCOT would have to modify the Current Day Reports (CDR) and Information Services Master (ISM) nodal systems. ERCOT stated that the initial cost/budgetary impact is less than $50,000 and could be absorbed into the Nodal Program budget without use of contingency funding. ERCOT explained that using its ISM data instead of the CDR system would require the following nodal system changes: (1) develop system modifications to the publication of transmission and transformer flows information from the CDR system; (2) replicate the transmission and transformer flows from the Energy Management System into the ISM system, which provides the ability to post data to the Market Information System (MIS) at a later date; (3) write a program in the ISM system to assemble information stored in ISM and post it at the designated time; and (4) write a program that could post the data after holding it after the Operating Day. ERCOT stated that if the commission makes a final decision on SER disclosure requirements by the end of October 2010, then ERCOT would be able to implement the nodal system changes necessary to comply with the requirements by Nodal Go Live.

Commission Response

With certain exceptions, existing §25.505(f)(3)(B) provides that generation or load resource-specific information provided to ERCOT shall be released by ERCOT 60 days after the day for which the information is accumulated. In adopting this requirement, the commission concluded that by 60 days after the information was accumulated, the information was not competitively sensitive. *Rulemaking Proceeding to Address Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas,* Project No. 33490, Order Adopting Amendment to §25.505 as Approved at the August 16, 2007, Open Meeting at 12 (Aug. 16, 2007). The generation or load resources to which the information pertains are controlled by companies and utilities that compete in the wholesale electric market.

In contrast to that prior rulemaking, the commission in this rulemaking is not directly addressing ERCOT's disclosure of resource-specific information. Instead, it is addressing the disclosure of information concerning the transmission system, through which competitors in the wholesale electric market provide their services. Pursuant to PURA Chapter 35, Subchapter A, the commission regulates wholesale transmission service, including ensuring nondiscriminatory service to eligible customers and setting rates. Thus, wholesale transmission service is a regulated service and operational information about the transmission system is therefore not competitively sensitive. In fact, timely disclosure of operational information about the transmission system is essential to the efficient operation of the wholesale electric market. As Luminant explained, market participants can gain or lose millions of dollars because of modeling errors related to the ERCOT transmission system, and disclosure of operational information about the transmission system permits market participants to identify problems that can lead to the correction of these errors. Thus, timely disclosure of transmission system information through the SER allows for the mitigation of financial harm, and inefficient operations, resulting from modeling errors related to the ERCOT transmission system.

Timely disclosure of transmission system information through the SER is especially critical at the start of the nodal market, which is scheduled to occur on December 1, 2010.

The nodal market constitutes a comprehensive redesign of the existing zonal wholesale market and has cost ERCOT approximately half a billion dollars and has taken approximately six years to design and implement. Pursuant to §25.501(m) (relating to Wholesale Market Design for the Electric Reliability Council of Texas), ERCOT contracted for an independent cost-benefit analysis of the nodal market, and that analysis showed that the benefits of the nodal market will substantially exceed its costs. The commission remains confident that the benefits of the nodal market will substantially exceed its costs. Nevertheless, as with any project of this magnitude and despite the extensive testing of the nodal market design that ERCOT and market participants have engaged in, implementation issues may arise, and these implementation issues should be identified and resolved as quickly as possible.

The commission is confident that ERCOT and the IMM will vigilantly monitor the nodal market to identify problems, particularly during the early period of its implementation. Nevertheless, market participants, given their "on the ground" participation in the market, may be able to more quickly identify some concerns and report them to ERCOT and the IMM. In addition, although market participants as a whole have diligently prepared for the implementation of the nodal market, their learning process for the nodal market will unavoidably continue after the market "goes live." As a result, as a general matter, the more information that they have about the actual operation of the nodal market, the better able they will be to adapt to it and thrive under it. As part of their learning process, market participants will undoubtedly have many questions about how the market is operating in practice during the early months of its operation. Furthermore, no new complex system ever fully operates as initially conceived. As a result, refinements to the nodal market will need to be made, including some that have already been identified, and the sources giving rise to those refinements should be identified as soon as possible.

The commission concludes that it is imperative that ERCOT timely disclose operational information related to the transmission system as soon as the nodal market is implemented. To ensure that this disclosure occurs, the commission has changed the amendment to divide the information that ERCOT initially discloses into two categories. First, ERCOT shall initially post the unredacted SER information 60 days after the day for which the information was accumulated. This 60-day posting requirement is consistent with existing §25.505(f)(3)(B)'s posting requirement for resource-specific information, and thereby avoids disclosing competitively sensitive information. Second, ERCOT shall initially post a redacted SER that avoids material disclosure of competitively sensitive information, as soon as reasonably practicable after collection of the State Estimator data. In addition, both initially and on an ongoing basis, ERCOT shall have the sole discretion to release relevant State Estimator data less than 60 days after the day for which the information is accumulated if it determines the release is necessary to provide complete and timely explanation and analysis of unexpected market operations and results or system events. These requirements ensure that market participants will have timely access to transmission system information as soon as the nodal market is implemented.

As explained above, as a general matter, the more information that market participants have about the actual operation of the nodal market, the better able they will be to adapt to it and thrive under it, thereby supporting an efficient competitive wholesale electric market. The concern with the SER arises from the fact that information in it, along with other information that ERCOT discloses, can be used to derive some resource-specific information. This information may be competitively sensitive and used to manipulate the market.

The State Estimator provides detailed operational information related to the transmission system. In addition, the specific information that is provided may change over time. In light of this, Calpine's comment is well taken that the ERCOT stakeholder process is better suited than a commission rule for addressing the detailed State Estimator disclosure requirements. As a result, the commission has changed the amendment to require that, in conjunction with the IMM and the commission staff, ERCOT, through its stakeholder process, shall develop protocols that detail, at a minimum, the methodology, duration, and posting requirement of a redacted version of the State Estimator data. The commission notes that its existing rules protect the rights of individual market participants vis-à-vis ERCOT conduct, including the results of its stakeholder process. Section 22.251 (relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct) provides that any affected entity may obtain relief from the commission for improper conduct, which would include a stakeholder-produced Protocol that provides for the inappropriate release of competitively sensitive information.

Competitively Sensitive Consumption Data

Texas Industrial Energy Consumers (TIEC) commented that the amendment should avoid unintended disclosure or conflicts between the commission's rules and Protocols regarding Private Use Networks (for example, Protocols §6.5.7.1.13(4)(b) and (d)), which are privately-owned transmission systems containing industrial loads and generation behind the point of interconnection with the ERCOT grid. It stated that it is critical that competitively sensitive consumption data be protected from disclosure as part of the SER, to prevent competitive harm to industrial customers, noting that private use networks are protected under numerous provisions of PURA, including §39.901, and the commission's Substantive Rules, including §25.361(e). TIEC contended that this protection is consistent with the information disclosure rules under the PIA. TIEC concluded by suggesting adding language to the amendment to specifically exempt disclosure of competitively sensitive consumption data from the SER posting or deleting the last sentence of the proposed language that was potentially too vague and encompassing.

CPS Energy stated that it supported a different treatment of data for private use networks but stated that TIEC's proposed edits to the proposed rule language are confusing. CPS Energy stated that a better way to address TIEC's concern would be to have an additional subsection in the rule to describe the treatment for private use networks. Otherwise, CPS Energy preferred the second option offered by TIEC.

Joint Commenters explained that private ownership of transmission does not preclude the generation behind the point of interconnection from selling power in ERCOT's wholesale market; therefore, a TIEC member who owns generation and sells output should not be exempted from ERCOT data disclosure. They stated that such an exemption would introduce discrimination among market participants.

Commission Response

The commission agrees with TIEC that any competitively sensitive load consumption data need not, and should not, be released as part of the SER, and has amended the rule accordingly. The commission notes that Private Use Network data was removed from the SER when the ERCOT Board of Directors approved Nodal Protocol Revision Request (NPRR) Number 202, relating to Clarification of Network Operations Model and State Estimator Posting, in January 2010. This amendment is not intended to change the disclosure protections for Private Use Networks as already provided in the ERCOT Protocols.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2010) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, §35.004, which requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive; §39.001, which establishes the legislative policies to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry, to encourage full and fair competition among all providers of electricity, and to protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information; §39.101, which establishes that customers are entitled to safe, reliable, and reasonably priced electricity, and gives the commission the authority to adopt and enforce rules to carry out these provisions; §39.151, which requires the commission to oversee and review the procedures established by an independent organization, directs market participants to comply with such procedures, and authorizes the commission to enforce such procedures; it also authorizes the commission to require an independent organization to provide reports and information relating to the independent organization's performance of its functions; and §39.157, which directs the commission to monitor market power associated with the generation, transmission, distribution, and sale of electricity and provides enforcement power to the commission to address any market power abuses.

Cross reference to statutes: Public Utility Regulatory Act §§14.002, 35.004, 39.001, 39.101, 39.151, and 39.157.

§25.505. Resource Adequacy in the Electric Reliability Council of Texas Power Region.

(a) General. The purpose of this section is to prescribe mechanisms that the Electric Reliability Council of Texas (ERCOT) shall establish to provide for resource adequacy in the energy-only market design that applies to the ERCOT power region. The mechanisms are intended to encourage market participants to build and maintain a mix of resources that sustain adequate supply of electric service in the ERCOT power region, and to encourage market participants to take advantage of practices such as hedging, long-term contracting between market participants that supply power and market participants that serve load, and price responsiveness by end-use customers.

(b) Definitions. The following terms, when used in this section, shall have the following meanings, unless the context indicates otherwise:

(1) Generation entity--an entity that owns or controls a generation resource.

(2) Event trigger--a calculated value for each interval that is equal to 50 times the Houston Ship Channel natural gas price index for each operating day, expressed in dollars per megawatt-hour (MWh) or dollars per megawatt per hour (MW/h). The event trigger shall be applied solely for the purpose of establishing the timing of the publication of certain market data and shall not be construed to establish the legitimacy of any offer, whether such offer is less than, equal to, or higher than the event trigger.

(3) Load entity--an entity that owns or controls a load resource, including, but not limited to, a load acting as a resource (LaaR) or a balancing up load (BUL), as those terms are defined in the ERCOT Protocols.

(4) Resource entity--an entity that is a generation entity or a load entity.

(c) Statement of opportunities (SOO). ERCOT shall publish a SOO that provides market participants with a projection of the capability of existing and planned electric generation resources, load resources, and transmission facilities to reliably meet ERCOT's projected needs. A SOO published in even-numbered years shall use a ten-year study horizon and be published by December 31 of those years. A SOO published in odd-numbered years shall use a five-year study horizon and be published on or around October 1 of those years. ERCOT shall prescribe reporting requirements for generation entities and transmission service providers (TSPs) to report to ERCOT their plans for adding new facilities, upgrading existing facilities, and mothballing or retiring existing facilities. ERCOT also shall prescribe reporting requirements for load entities to report to ERCOT their plans for adding new load resources or retiring existing load resources.

(d) Projected assessment of system adequacy (PASA). Beginning no later than October 1, 2006, unless otherwise specified below, ERCOT shall provide market participants with information to assess the adequacy of resources and transmission facilities to meet projected demand in the following two reports:

(1) Each month, ERCOT shall publish a Medium-Term PASA for each week of the subsequent three years beginning with the week after the Medium-Term PASA is published. At a minimum, each Medium-Term PASA shall include the following information:

(A) Load forecast by ERCOT zone or area;

(B) Ancillary service requirements;

(C) Transmission constraints; and

(D) Aggregated information on the availability of resources, by ERCOT zone or area, including load resources.

(2) Each day, ERCOT shall publish a Short-Term PASA for each hour for the seven days beginning with the day the Short-Term PASA is published.

(A) At a minimum, each Short-Term PASA shall include the following information:

(i) Load forecast by ERCOT zone or area;

(ii) Ancillary service requirements;

(iii) Transmission constraints; and

(iv) Aggregated information on the availability of resources, by ERCOT zone or area, including load resources.

(B) By October 1, 2006, ERCOT shall file at the commission a plan to incorporate the impact of transmission constraints into its Short-Term PASA at a later date.

(e) Filing of resource and transmission information with ERCOT. ERCOT shall prescribe reporting requirements for resource entities and TSPs for the preparation of PASAs. At a minimum, the following information shall be reported to ERCOT:

(1) TSPs shall provide ERCOT with information on planned and existing transmission outages.

(2) Generation entities shall provide ERCOT with information on planned and existing generation outages.

(3) Load entities shall provide ERCOT with information on planned and existing availability of LaaRs, specified by type of ancillary service, and BULs.

(4) Generation entities shall provide ERCOT with a complete list of generation resource availability and performance capabilities, including, but not limited to:

(A) the net dependable capability of generation resources;

(B) projected output of non-dispatchable resources such as wind turbines, run-of-the-river hydro, and solar power; and

(C) output limitations on generation resources that result from fuel or environmental restrictions.

(5) Load serving entities (LSEs) shall provide ERCOT with complete information on load response capabilities that are self-arranged or pursuant to bilateral agreements between LSEs and their customers.

(f) Publication of resource and load information in ERCOT markets. To increase the transparency of the ERCOT-administered markets, ERCOT shall post at a publicly accessible location on its website, beginning no later than October 1, 2006, the information required pursuant to this subsection, unless a different date is specified by a paragraph of this subsection.

(1) The following information in aggregated form, for each settlement interval and for each area where available, shall be posted two calendar days after the day for which the information is accumulated.

(A) Quantities and prices of offers for energy and each type of ancillary capacity service, in the form of supply curves.

(B) Self-arranged energy and ancillary capacity services, for each type of service.

(C) Actual resource output.

(D) Load and resource output for all entities that dynamically schedule their resources.

(E) During the operation of the market under a zonal market design, scheduled load and actual load. During the operation of the market under a nodal market design, firm scheduled load, scheduled load with "up to" limits on congestion charges, and actual load.

(2) During the operation of the market under a nodal market design, the following day-ahead market information in aggregate form shall be posted two calendar days after the day for which the information is accumulated: load bids, including virtual loads, in the form of day-ahead bid curves, and cleared load.

(3) The following information in entity-specific form, for each settlement interval, shall be posted as specified in subparagraphs (A) - (E) of this paragraph.

(A) During the operation of the market under a zonal market design:

(i) Portfolio offer curves for balancing energy and for each type of ancillary service, for each area where available, shall be posted 60 days after the day for which the information is accumulated beginning September 1, 2007, except that, for the highest-priced offer selected or dispatched by ERCOT for each interval after January 12, 2007, ERCOT shall post the offer price and the name of the entity submitting the offer 48 hours after the day for which the information is accumulated. In the event of interzonal congestion, ERCOT shall post, separately for each zone, the offer price and the name of the entity submitting the highest-priced offer selected or dispatched.

(ii) If the market clearing price for energy (MCPE) or the market clearing price for capacity (MCPC) exceeds the event trigger during any interval, the portion of every market participant's price-quantity offer pair for balancing energy service and each other ancillary service that is at or above the event trigger for that service and that interval shall be posted seven (7) days after the day for which the offer is submitted. ERCOT shall implement the requirements of this clause by September 1, 2007.

(iii) Other offer-specific information for each type of service and for each area where available shall be posted 90 days after the day for which the information is accumulated beginning March 1, 2007. Effective March 1, 2008, this information shall be posted 60 days after the day the information was accumulated. The information subject to this disclosure requirement is as follows:

(I) final energy schedules for each QSE;

(II) final ancillary services schedules for each QSE;

(III) resource plans for each QSE representing a resource;

(IV) actual output from each resource; and

(V) all dispatch instructions from ERCOT for balancing energy and ancillary services.

(iv) The information posted shall include the names of the resources in the portfolio that were committed, the name of the entity submitting the information, the name of the entity controlling each resource in the portfolio.

(B) Two months after the start of operation of the market under a nodal market design:

(i) Offer curves (prices and quantities) for each type of ancillary service and for energy at each settlement point in the real time market, shall be posted 60 days after the day for which the information is accumulated except that, for the highest-priced offer selected or dispatched for each interval on an ERCOT-wide basis, ERCOT shall post the offer price and the name of the entity submitting the offer 48 hours after the day for which the information is accumulated.

(ii) If the MCPE or the MCPC exceeds the event trigger during any interval, the portion of every market participant's price-quantity offer pairs for balancing energy service and each other ancillary service that is at or above the event trigger for that service and that interval shall be posted seven (7) days after the day for which the offer is submitted.

(iii) Other resource-specific information, as well as self-arranged energy and ancillary capacity services, and actual resource output, for each type of service and for each resource at each settlement point shall be posted 60 days after the day for which the information is accumulated.

(iv) The posted information shall be linked to the name of the resource (or identified as a virtual offer), the name of the entity submitting the information, and the name of the entity controlling the resource. If there are multiple offers for the resource, ERCOT shall post the specified information for each offer for the resource, including the name of the entity submitting the offer and the name of the entity controlling the resource.

(C) The load and generation resource output for each zone, for each entity that dynamically schedules its resources, shall be posted 90 days after the day for which the information is accumulated beginning March 1, 2007. Effective March 1, 2008, the information required by this subparagraph shall be posted 60 days after the day for which the information is accumulated.

(D) ERCOT shall use §25.502(d) of this title (relating to Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas) as a basis for determining the control of a resource and shall include this information in its market operations data system.

(E) After the start of operation of the market under a nodal market design, ERCOT shall begin posting transmission flows, voltages, transformer flows, voltages and tap positions *(i.e.*, State Estimator data) 60 days after the day for which the data were accumulated or other time interval as established in clause (ii) of this subparagraph. The data released shall be made available simultaneously to all market participants.

(i) Notwithstanding the provisions of this subparagraph and the provisions of subparagraph (B) of this paragraph, ERCOT, in its sole discretion, shall release relevant State Estimator data earlier than 60 days after the day for which the information is accumulated if it determines the release is necessary to provide a complete and timely explanation and analysis of unexpected market operations and results or system events, including but not limited to pricing anomalies, recurring transmission congestion, and system disturbances. ERCOT's release of data under this clause shall be limited to intervals associated with the unexpected market or system event as determined by ERCOT. The data released shall be made available simultaneously to all market participants.

(ii) Notwithstanding the provisions of this subparagraph and the other provisions of subparagraph (B) of this paragraph, ERCOT shall, by the start of the nodal market, develop and post a redacted version of State Estimator data, as soon as reasonably practicable after collection of the data, so long as a redacted version excludes information (including but not limited to, voltages, transmission flows and transformer flows) from which resource-specific output levels or offer curves could continually and systematically be derived. Concurrently, in conjunction with the Independent Market Monitor and the commission Staff, ERCOT, through its stakeholder process, shall develop protocols that detail, at a minimum, the methodology, duration, and posting requirement of a redacted version of the State Estimator data. The redacted report methodology developed through the stakeholder process shall be completed within 90 days of the start of the nodal market. If ERCOT is unable to develop a cost effective protocol for the redaction process of the State Estimator data within 90 days of the start of the nodal market, then the following information shall be released as soon as reasonably practicable:

(I) Current commercially significant constraints (CSCs) and closely related elements (CREs) line flows that are embod-

ied in the competitive constraint list from the Competitive Constraint Test;

(II) For phase shifting transformers, tap positions and line flows;

(III) Voltages at all buses;

(IV) Line flows on lines that make up interfaces (import, export, flow gate, or stability); and

(V) Line flows on DC ties.

(iii) In no event shall ERCOT disclose competitively sensitive consumption data.

(g) Scarcity pricing mechanism (SPM). ERCOT shall administer the SPM. The SPM shall take effect on January 1, 2007, unless the commission by order changes this date. The SPM shall operate as follows:

(1) The SPM shall operate on an annual resource adequacy cycle, starting on January 1 and ending on December 31 of each year.

(2) For each day of the annual resource adequacy cycle, the peaking operating cost (POC) shall be 10 times the daily Houston Ship Channel gas price index for the previous business day. The POC is calculated in dollars per megawatt-hour (MWh).

(3) For the purpose of this section, the real-time energy price (RTEP) shall be measured as the price at an ERCOT-calculated ERCOT-wide hub.

(4) In the annual resource adequacy cycle, the peaker net margin (PNM) shall be calculated as:
Figure: 16 TAC §25.505(g)(4) (No change.)

(5) Each day ERCOT shall post at a publicly accessible location on its website the updated value of the PNM, in dollars per megawatt (MW).

(6) The system-wide offer caps shall be as follows:

(A) The low system offer cap (LCAP) shall be set on a daily basis at the higher of:

(i) $500 per MWh and $500 per MW per hour; or

(ii) 50 times the daily Houston Ship Channel gas price index of the previous business day, expressed in dollars per MWh and dollars per MW per hour.

(B) Beginning March 1, 2007, the high system-wide offer cap (HCAP) shall be $1,500 per MWh and $1,500 per MW per hour.

(C) Beginning March 1, 2008, the HCAP shall be $2,250 per MWh and $2,250 per MW per hour.

(D) Beginning two months after the opening of the nodal market, the HCAP shall be $3,000 per MWh and $3,000 per MW per hour.

(E) At the beginning of the annual resource adequacy cycle, the system-wide offer cap shall be set equal to the HCAP and, except for increases authorized in this section, maintained at this level as long as the PNM during an annual resource adequacy cycle is less than or equal to $175,000 per MW. During an annual resource adequacy cycle, the system-wide offer cap shall be increased in accordance with the schedule authorized in this section unless the PNM has been exceeded by that date. If the PNM exceeds $175,000 per MW during an annual resource adequacy schedule, the system-wide offer cap shall be reset at the LCAP for the remainder of that annual resource adequacy cycle.

(F) The Independent Market Monitor, as part of its responsibilities pursuant to Public Utility Regulatory Act §39.1515(h), may conduct an annual review of the effectiveness of the SPM.

(G) ERCOT, through its stakeholder process, may adopt protocols setting the HCAP at a level below that specified in subparagraphs (C) and (D) of this paragraph. Protocols adopted pursuant to this subparagraph shall terminate no later than the 45th day after ERCOT begins to use nodal energy prices for resources pursuant to §25.501(f) of this title (relating to Wholesale Market Design for the Electric Reliability Council of Texas). Protocols adopted pursuant to this subparagraph shall not set the HCAP so low that a resource would be required to offer service to the market below its marginal cost, unless the protocols provide a mechanism allowing the resource to recover such costs.

(h) Development and implementation. ERCOT shall use a stakeholder process to develop protocols that comply with this section. Nothing in this section prevents the commission from taking actions necessary to protect the public interest, including actions that are otherwise inconsistent with the other provisions in this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 5, 2010.

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 66. STATE ADOPTION AND DISTRIBUTION OF INSTRUCTIONAL MATERIALS

The Texas Education Agency (TEA) adopts new §§66.1001, 66.1003, 66.1005, 66.1007, 66.1009, 66.1011, 66.1013, 66.1015, 66.1017, 66.1019, 66.1021, 66.1023, 66.1025, 66.1027, 66.1029, 66.1031, 66.1033, 66.1035, 66.1037, 66.1039, and 66.1041; new §§66.1101, 66.1103, 66.1105, 66.1107, 66.1109, 66.1111, 66.1113, 66.1115, and 66.1117; and new §§66.1201, 66.1203, and 66.1205, concerning instructional materials. Sections 66.1001, 66.1003, 66.1005, 66.1011, 66.1015, 66.1017, 66.1021, 66.1023, 66.1025, 66.1029, and 66.1041; §§66.1101, 66.1103, 66.1105, 66.1109, 66.1111, 66.1113, 66.1115, and 66.1117; and §§66.1201, 66.1203, and 66.1205 are adopted without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3379) and will not be republished. Sections 66.1007, 66.1009, 66.1013, 66.1019, 66.1027, 66.1031, 66.1033, 66.1035, 66.1037, and 66.1039 and §66.1107 are adopted with changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3379). The adopted new

sections implement the requirements of the Texas Education Code (TEC), Chapter 31, as amended by House Bill (HB) 4294, HB 2488, and HB 1332, 81st Texas Legislature, 2009.

In June 2009, the Governor signed into law HB 4294, relating to textbooks, electronic textbooks, instructional materials, and technological equipment in public schools. This legislation requires the commissioner to adopt a list of electronic textbooks and instructional materials that convey information to the student or otherwise contribute to the learning process, including tools, models, and investigative materials designed for use as part of the foundation curriculum for science in Kindergarten-Grade 5. The commissioner is required to adopt rules that are consistent with the TEC, §31.151, regarding the duties of publishers and manufacturers, as appropriate, and the imposition of a reasonable penalty. The commissioner's rules must also require public notice for the submission of an electronic textbook or instructional material.

Adopted new 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials, Subchapter AA, Commissioner's Rules Concerning the Commissioner's List of Electronic Textbooks and Instructional Materials, incorporates similar provisions found in the State Board of Education (SBOE) rules for instructional materials. The adopted new commissioner's rules establish definitions, scope of rules, requirement for registers, manufacturing standards and specifications, administrative penalties, and review and adoption cycles. The adopted new rules specify provisions relating to the public notice and schedule for adopting electronic textbooks and instructional materials. The rules also specify provisions for electronic textbooks and instructional materials review panel appointments, duties and conduct, orientation, and no-contact periods. In addition, the rules set forth requirements for responses to requests for electronic textbooks and instructional materials, materials offered for adoption, public comment, consideration and adoption by the commissioner, statewide licenses, and contracts. The rules also address updates, delivery, and sample copies of adopted electronic textbooks and instructional materials and the selection of materials by school districts. In response to public comment, the following changes to 19 TAC Chapter 66, Subchapter AA, were made since published as proposed.

Section 66.1007, Manufacturing Standards and Specifications, was modified at adoption to clarify Rehabilitation Act, §508, accessibility requirements and compliance if there is a post-approval change to an electronic textbook.

Section 66.1009, Procedures Governing Violations of Statutes--Administrative Penalties, was modified at adoption to be more applicable to online content, including the clarification of provisions relating to assessing penalties for failure to correct errors, the addition of a specific timeline for responding to requests for content changes, the separation of provisions relating to Internet links from online requirements, and the modification to restrictions on collection and use of information for operational tasks.

Section 66.1013, Request, Public Notice, and Schedule for Adopting Electronic Textbooks and Instructional Materials, was modified at adoption to specify a minimum amount of time for content development upon release of the request for materials.

Section 66.1019, Electronic Textbooks and Instructional Materials Review Panels: Duties and Conduct, was modified at adoption to align with language in §66.1013 relating to coverage of essential knowledge and skills.

Section 66.1027, Electronic Textbooks and Instructional Materials Offered for Adoption by the Commissioner, was modified at adoption to clarify the definition of appropriate training for teachers and to provide publishers with the option of submitting correlations using an electronic format.

Section 66.1031, Consideration and Adoption of Electronic Textbooks and Instructional Materials, was modified at adoption to specify that a time period will be established for a publisher to address the reasons why its electronic submission was rejected. The section was also modified to clarify that materials would be rejected for failure to meet the minimum number of essential knowledge and skills.

Section 66.1033, Statewide License, was modified at adoption to clarify that the commissioner has the flexibility to consider a bid based on unit price as well as a submission of a statewide license.

Section 66.1035, Updates to Electronic Textbooks and Instructional Materials, was modified at adoption to remove duplicate language regarding navigational and management feature updates and to add a specific timeline for responding to requests for content changes.

Section 66.1037, Delivery of Adopted Electronic Textbooks and Instructional Materials, was modified at adoption to clarify and consolidate language that requires a publisher to notify affected school districts and charter schools when materials are not available by the date specified in the sales contract.

Section 66.1039, Sample Copies of Electronic Textbooks and Instructional Materials for School Districts, was modified at adoption to address the delivery, duplication, and return of samples.

In response to comments and for consistency, technical edits were made throughout the subchapter to clarify which specified time periods reflect business days rather than calendar days.

In June 2009, the Governor signed into law HB 2488, relating to the purchase of an open-source textbook through a competitive process. This legislation allows the commissioner of education to issue a request for proposal for state-developed open-source textbooks for use in the public schools of Texas according to the TEC, Chapter 31. The TEC, Chapter 31, Subchapter B-1, requires that the open-source textbooks be suitable for use in special populations, including bilingual education programs, and adopted or purchased according to the rules in this subchapter.

Adopted new 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials, Subchapter BB, Commissioner's Rules Concerning State-Developed Open-Source Textbooks, establishes definitions, scope of rules, requirement for registers, manufacturing standards and specifications, and review and adoption cycles. The new rules specify provisions relating to the public notice and schedule for adopting state-developed open-source textbooks, including cost and contracts. In response to public comment, the following change to 19 TAC Chapter 66, Subchapter BB, was made since published as proposed.

Section 66.1107, Manufacturing Standards and Specifications, was modified at adoption to clarify Rehabilitation Act, §508, accessibility requirements and compliance if there is a post-approval change to an electronic textbook.

In June 2009, the Governor signed into law HB 1332, relating to responsibility for public school textbooks and technological equipment and failure by students to return textbooks or tech-

nological equipment. This legislation requires the commissioner to adopt by rule criteria for determining whether a textbook, including an electronic textbook, and technological equipment are returned in an acceptable condition.

Adopted new 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials, Subchapter CC, Commissioner's Rules Concerning Acceptable Condition of Public School Textbooks, Electronic Textbooks, and Technological Equipment, specifies the conditions that must be met when students return public school textbooks, electronic textbooks, and technological equipment. No changes were made to 19 TAC Chapter 66, Subchapter CC, since published as proposed.

The review and adoption process for electronic textbooks and instructional materials will follow the process in SBOE rule for instructional materials, with provisions for differences in delivery formats and new requirements authorized by HB 4294 and HB 2488. School districts will report to the TEA reasons for cancelling a subscription for an electronic textbook or instructional material and subscribing to a new electronic textbook or instructional material. Districts must verify that selected electronic or open-source textbooks meet the Texas essential knowledge and skills. Statute authorizes school districts to establish local policy for waiving or reducing the payment requirement for failure to return textbooks, electronic textbooks, and technological equipment for a student who is from a low-income family.

The adopted new rules have no new locally maintained paperwork requirements. All reporting requirements will be incorporated into the EMAT system.

The TEA determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began April 30, 2010, and ended June 1, 2010. The following reflects a summary of public comments received and corresponding agency responses regarding proposed new 19 TAC Chapter 66, Subchapters AA-CC.

Comment. The senior director of education policy for the Software and Information Industry Association commented that the 508 compliance requirement for electronic textbooks in §66.1007(c) does not address compliance if there was a post-approval change to the electronic textbook that took it out of compliance.

Agency Response. The agency agrees. Language was modified in §66.1007(c) to clarify Rehabilitation Act, §508, accessibility requirements and compliance if there was a post-approval change to the electronic textbook.

Comment. The senior director of education policy for the Software and Information Industry Association commented that the replacement requirements in §66.1009(i) for electronic, web-based, or online instructional materials should be reflected within the terms of the contract and include language that applies more to the print industry.

Agency Response. The agency agrees. Language was modified in §66.1009(i), relettered as §66.1009(h), to make it more applicable to online content as outlined under terms of the contract.

Comment. The senior director of education policy for the Software and Information Industry Association commented that in §66.1009(j), an electronic content update request should require a response to the request within 45 days to reflect the timeliness of the electronic content. The commenter suggested that absent a response within 45 days, the content provider would make the requested content update(s). The commenter further stated that factual and software coding errors should not require the commissioner's approval.

Agency Response. The agency agrees in part and disagrees in part. The agency agrees that an electronic content update request should require a response within a specified time period. Language was modified in §66.1009(j), relettered as §66.1009(i), to require a response within 30 business days of the request. The language was also modified to specify that required factual or software coding errors will not require commissioner's approval. The agency disagrees with the comment to allow the content provider to update their content if the commissioner does not respond within a specified time period. Content updates require commissioner approval to ensure Texas Essential Knowledge and Skills (TEKS) alignment and error-free materials.

Comment. The senior director of education policy for the Software and Information Industry Association commented that in §66.1009(k), a request for content removal should require a response to the request within 45 days to reflect the timeliness of the electronic content. The commenter suggested that absent a response within 45 days, the content provider would remove the content. The commenter also suggested deleting language relating to changes in the content.

Agency Response. The agency agrees in part and disagrees in part. The agency agrees that requests for removal of content should require a response within a specified time period. Language was modified in §66.1009(k), relettered as §66.1009(j), to require a response within 30 business days of the request. The agency disagrees with the comment that allows the content provider to remove their content if the commissioner does not respond within a specified time period. Content updates, including removal of content, require commissioner approval to ensure TEKS alignment and error-free materials.

Comment. The senior director of education policy for the Software and Information Industry Association commented that in §66.1009(l), the online requirements should be addressed separately from Internet links because of the complexity of the issues such as broken links or coding errors. The commenter further suggested that the content provider be given the latitude to correct bad links, as well as provide additional instances of TEKS coverage, without the approval from the commissioner.

Agency Response. The agency agrees in part and disagrees in part. The agency agrees with the comment to separate online requirements and links. Language was modified in §66.1009(l), relettered as §66.1009(k), to address only online requirements, and language was added as new §66.1009(l) to address the Internet links separately. The agency also agrees with the comment to allow the content provider to correct bad links without the approval of the commissioner and included language in new §66.1009(l) to address correction of Internet links. The agency disagrees, however, that the publisher should be allowed to add content without the approval of the commissioner. Content changes require commissioner approval to ensure TEKS alignment and error-free materials.

Comment. The senior director of education policy for the Software and Information Industry Association commented that the

online requirements in §66.1009(l) should include the collection of information necessary for legitimate operational tasks. The commenter stated that use of such information will follow the federal Family Educational Rights and Privacy Acts (FERPA).

Agency Response. The agency agrees. Language was modified in §66.1009(l), relettered as §66.1009(k), to give the publisher permission to collect information necessary for legitimate operational tasks and to follow FERPA guidelines.

Comment. The senior director of education policy for the Software and Information Industry Association commented that the adoption cycle cited in §66.1011(a) and (b) should be continuous and ongoing on a yearly basis.

Agency Response. The agency disagrees and maintained language as published as proposed. The language in §66.1011 gives the commissioner the flexibility to determine the timeline for the adoption cycle and the subject areas for acquiring electronic textbooks.

Comment. The senior director of education policy for the Software and Information Industry Association commented that the language in §66.1013(a) for the request, public notice, and schedule for adopting electronic textbooks and instructional materials should be modified to be consistent with language proposed by the commenter on the adoption cycle.

Agency Response. The agency disagrees and maintained language as published as proposed. The language in §66.1013(a) is consistent with language on the adoption cycle in §66.1011.

Comment. The senior director of education policy for the Software and Information Industry Association commented that the language in §66.1027(c), relating to training provided to teachers, should be focused on using the electronic textbook in the classroom.

Agency Response. The agency agrees. Language was modified in §66.1027(c) to clarify that the definition of appropriate training for teachers includes acquiring knowledge and skills necessary to effectively use electronic textbooks in the classroom.

Comment. The senior director of education policy for the Software and Information Industry Association commented that the language in §66.1027(d), relating to the price for electronic textbooks, should be clarified regarding price discounts.

Agency Response. The agency disagrees and maintained language as published as proposed. The agency has determined that price information in §66.1027(d) does not require additional clarification.

Comment. The senior director of education policy for the Software and Information Industry Association commented that the correlation instrument provided by the publisher in §66.1027(g) should include the option of an electronic format.

Agency Response. The agency agrees. Language was modified in §66.1027(g) to include an option of the electronic format.

Comment. The senior director of education policy for the Software and Information Industry Association commented that the evaluation of electronic textbooks and instructional materials in §66.1031(a) should not include pricing as criteria.

Agency Response. The agency disagrees and maintained language as published as proposed. The commissioner will consider pricing for the purposes of cost savings to the state.

Comment. The senior director of education policy for the Software and Information Industry Association commented on §66.1031(b), recommending that a publisher be provided adequate time to address the reasons the commissioner would reject an electronic textbook submission.

Agency Response. The agency agrees. Language was modified in §66.1031(b) to specify that the commissioner will establish a time period for a publisher to address the reasons an electronic textbook submission was rejected.

Comment. The senior director of education policy for the Software and Information Industry Association requested clarification on §66.1033, relating to statewide licenses. In addition, the commenter recommended that, at a minimum, language be deleted in §66.1033(c) in order to allow per-pupil pricing for a statewide license. The commenter also recommended that language be added to §66.1033(e) to explicitly state that publishers are not required to submit a statewide license.

Agency Response. The agency disagrees and maintained language as published as proposed. The agency provides the following clarification. To take advantage of the economies of scale, the statewide price should not be based on a unit price. The districts and open-enrollment charter schools will have the option to consider a statewide license submission or select from other content providers with unit-priced materials approved by the commissioner. Statewide licensing does not prohibit submission of a bid based on unit price.

Comment. The senior director of education policy for the Software and Information Industry Association commented that publisher requests for navigational and management feature updates should be removed from §66.1035(a) since it is addressed in §66.1035(f).

Agency Response. The agency agrees. Language was modified in §66.1035(a) to remove requests for navigational and management feature updates since it is addressed in §66.1035(f).

Comment. The senior director of education policy for the Software and Information Industry Association commented that a publisher request for updates in §66.1035(a) should require a response within 45 days. The commenter suggested that if the commissioner does not respond to a request to update the content within 45 days, the publisher should be allowed to update the content.

Agency Response. The agency agrees in part and disagrees in part. The agency agrees that an update request should require a response within a specified time period. Language was added in §66.1035(e) to require a response within 30 business days of the request. The agency disagrees with the comment to allow the content provider to update their content if the commissioner does not respond within a specified time period. Content updates require commissioner approval to ensure TEKS alignment and error-free materials.

Comment. The senior director of education policy for the Software and Information Industry Association commented that §66.1035(e) should be modified to specify that changes requested by the commissioner should be restricted to terms of the contract and that the frequency of such requests should be limited.

Agency Response. The agency disagrees and maintained language as published as proposed. The purpose of requests for changes would be to ensure that content remains current.

Comment. The senior director of education policy for the Software and Information Industry Association commented that §66.1037(b) and (c) should be combined and modified to clarify the expectations for publishers to make their electronic textbook available by a certain date.

Agency Response. The agency agrees. Language was modified to combine §66.1037(b) and (c) to specify that a publisher will notify affected school districts and open-enrollment charter schools of the expected availability date of each title that is not available by the date specified in the sales contract.

Comment. The senior director of education policy for the Software and Information Industry Association commented that §66.1039(b) should be modified to address management of software and online content. The commenter also recommended that §66.1039(b) be modified to ensure that samples are not copied prior to an agreement with the publisher.

Agency Response. The agency agrees. Language was added in §66.1039(b) to specify that samples may be delivered as web-based or online materials as determined by the publisher. Language was also added to specify that samples are not to be copied prior to an agreement with the publisher.

Comment. The senior director of education policy for the Software and Information Industry Association commented that §66.1039(c) should be revised to specify that the sample copy will be supplied contingent upon an agreement to allow retrieval of the sample.

Agency Response. The agency disagrees; however, language was added in §66.1039(c) to require a publisher to set a reasonable period of time for district review of a sample.

Comment. The senior director of education policy for the Software and Information Industry Association commented that §66.1111(a) and (b) should be modified to focus limited state resources on open-source textbooks in those subjects and/or grade levels where there is otherwise a lack of materials available from either the commissioner's list or the State Board of Education (SBOE) adoption list.

Agency Response. The agency disagrees and maintained language as published as proposed. The language in the rule establishes that the commissioner will determine the need for state-developed open-source textbooks.

Comment. The senior director of education policy for the Software and Information Industry Association inquired if in §66.1115 Texas law includes state-developed open-source textbooks under the definition of the set of SBOE adopted textbooks required in each classroom.

Agency Response. The agency provides the following clarification. House Bill (HB) 2488 authorizes the commissioner to request state-developed open-source electronic textbooks, which is separate and apart from the SBOE university-developed open-source electronic textbooks. Currently, the agency has requested an Attorney General's opinion on whether the university-developed open-source textbook satisfies the SBOE classroom set requirement.

Comment. The senior director of education policy for the Software and Information Industry Association requested clarification on the intent of §66.1203, which defines the "acceptable condition" of an electronic textbook.

Agency Response. The agency provides the following clarification. Through new 19 TAC Chapter 66, Subchapter CC, the agency has incorporated the requirements of HB 1332, which requires the commissioner to by rule adopt the criteria for determining whether a textbook, including an electronic textbook, and technological equipment are returned in an acceptable condition.

Comment. The executive director of the American Association of Publishers commented on §66.1009(b) regarding penalties for failure to correct factual errors. The commenter stated that the intent of these rules is specific to printed textbooks and recommended that these penalties not apply to the commissioner's adoption of electronic textbooks.

Agency Response. The agency disagrees and maintained language as published as proposed in §66.1009(b). However, language was modified in §66.1009(a) to establish that the commissioner will determine the length of time needed to correct a factual error and assess a penalty if the publisher does not correct the error within the time period provided. Commissioner discretion regarding penalties is also addressed in §66.1009(m).

Comment. The executive director of the American Association of Publishers commented on language in §66.1009(l) regarding the online requirements prohibiting publishers from adding Internet links to the electronic materials without the commissioner's approval. The commenter further stated that the proposed text prohibits the collection of user information by the publisher that includes email addresses. The commenter recommended allowing publishers to make the changes and submit a list of the changes to the commissioner. The commenter also stated that publishers should be prohibited from using email addresses for purposes other than validation of the legitimate use of the program.

Agency Response. The agency agrees. Language was modified in §66.1009(l), relettered as §66.1009(k), to remove provisions relating to Internet links and place them in new §66.1009(l), allowing the addition of Internet links to the electronic materials as long as the content remains intact. However, publishers that make the changes must submit a list of the changes to the commissioner. In addition, language was modified in §66.1009(l), relettered as §66.1009(k), to give the publisher permission to collect information necessary for legitimate operational tasks and to follow FERPA guidelines.

Comment. The executive director of the American Association of Publishers commented on §66.1013(c) regarding coverage of the TEKS. The commenter stated that publishers require adequate time for content developers to ensure the minimum percentage of TEKS coverage for submissions in order for their products to be approved.

Agency Response. The agency agrees. Language was added as new §66.1013(d) to provide a minimum of 90 calendar days for content development upon the release of the request for materials.

Comment. The executive director of the American Association of Publishers commented on §66.1019(a)(1)(D) and (E), as published as proposed, which specifies that electronic textbooks and instructional materials must address the TEKS at least three times. The commenter noted, however, that §66.1013(c) states that the request for electronic textbooks and instructional materials will specify the number of times that the TEKS must be met.

Agency Response. The agency agrees. Language in §66.1013(c) was not in alignment with language in §66.1019(a)(1)(D) and (E). Therefore, language in

§66.1019(a)(1)(C) was modified to align with §66.1013(c) and address the specific number of opportunities that the TEKS are addressed for students to demonstrate knowledge. Language in §66.1019(a)(1)(D) and (E), as published as proposed, was deleted.

Comment. The executive director of the American Association of Publishers commented that a process should be included in commissioner's rule comparable to the SBOE process that allows publishers a limited opportunity to add new content to address missing TEKS. The commenter stated that the process should also include an opportunity to request a meeting with publishers to obtain responses to questions regarding instructional materials being evaluated by the content experts.

Agency Response. The agency disagrees and maintained language as published as proposed. The inclusion of such language in rule would limit the commissioner's discretion with the review process. Depending on the request for electronic textbooks and instructional materials, the commissioner has the flexibility to include a process within the request to allow publishers an opportunity to add new content similar to the SBOE process.

Comment. The executive director of the American Association of Publishers commented on §66.1031(b)(1), which states that publishers may have their materials rejected if they fail to meet the essential knowledge and skills specified in the request for electronic textbooks and instructional materials. The commenter stated that this language implies that publishers must address 100% of the TEKS included in the request for electronic materials.

Agency Response. The agency agrees. Language was modified in §66.1031(b)(1) to clarify that a publisher's material would be rejected if it fails to meet the minimum number of TEKS specified in the request for electronic textbooks and instructional materials.

Comment. The executive director of the American Association of Publishers commented on §66.1033(a), which states that the commissioner will accept one or more statewide license(s) submitted by a publisher. The commenter stated that this language implies that the commissioner will accept one or more statewide license(s) and does not provide the flexibility for the commissioner to consider a per-student price.

Agency Response. The agency agrees. Language was modified in §66.1033(a) to clarify that the commissioner may consider a per-student-price proposal as well as submissions of statewide licenses.

Comment. The executive director of the American Association of Publishers commented on §66.1035(a), which requires publishers to request approval to update the navigational features or management system related to the electronic textbooks or instructional materials. The commenter noted, however, that §66.1035(f) states that publishers shall notify the commissioner before making electronic design changes, including updates to the navigational features or management system updates. The commenter recommended that these sections be reconciled to clarify approval.

Agency Response. The agency agrees. Language was modified in §66.1035(a) to remove requests for navigational and management feature updates since it is addressed in §66.1035(f).

Comment. The executive director of the American Association of Publishers commented on §66.1035, which requires the publishers to request approval to update electronic textbooks or instructional materials. The commenter requested assurances that a timely response for approval to update electronic textbooks is provided by the commissioner.

Agency Response. The agency agrees. Language was added in §66.1035(e) to state that the commissioner will respond to update requests within 30 business days after receipt of the request.

Comment. The executive director of the American Association of Publishers commented on §66.1107(c), which requires publishers to bear the responsibility and cost for compliance with 508 accessibility standards throughout the contract period. The commenter requested that this section apply only if the electronic textbooks do not meet the requirements in effect at the time of the contract and that the section not apply if the 508 accessibility standards change.

Agency Response. The agency agrees. Language was modified in §66.1107(c) to clarify Rehabilitation Act, §508, accessibility requirements and compliance if there was a post-approval change to the electronic textbook.

Comment. The regional director of the Scientific Learning Corporation commented that the §66.1001 definition of an electronic textbook discourages innovation and new approaches in the field of electronic instructional media.

Agency Response. The agency disagrees and maintained language as published as proposed. The definition of electronic textbooks is in statute and cannot be changed or modified.

Comment. The regional director of the Scientific Learning Corporation commented on the §66.1009(b)(3) requirement to correct errors in electronic textbooks within 30 days of notification. The commenter stated that the timeline requirement is not sufficient because it may involve complex programming code changes.

Agency Response. The agency disagrees; however, language was modified to clarify that publishers must correct errors within 30 business days of notification rather than 30 calendar days. It is not anticipated that factual errors could result in complex programming code changes.

Comment. The regional director of the Scientific Learning Corporation commented that the §66.1009(f) requirement that electronic materials be accessible 24 hours a day and 7 days a week may not be appropriate for consumption by students 24/7.

Agency Response. The agency disagrees and maintained language as published as proposed. The electronic materials should be made accessible 24 hours a day and 7 days a week as indicated in §66.1009(f), relettered as §66.1009(e). Teacher oversight will determine the availability of electronic materials to the students.

Comment. The regional director of the Scientific Learning Corporation commented on the §66.1009(l) requirement that there be no collection of information about the user that would allow determination of personal information. The commenter stated that this action may hamper the ability of the electronic program to provide information for operational tasks such as monitoring progress.

Agency Response. The agency agrees. Language was modified in §66.1009(l), relettered as §66.1009(k), to give the publisher permission to collect information necessary for legitimate operational tasks and to follow FERPA guidelines.

Comment. The regional director of the Scientific Learning Corporation commented that the adoption cycle set forth in §66.1011 should be flexible enough to respond to instructional needs/issues that may arise in schools.

Agency Response. The agency disagrees and maintained language as published as proposed. The language in §66.1011 gives the commissioner the flexibility to determine the timeline for the adoption cycle and the subject areas for acquiring electronic textbooks.

Comment. The regional director of the Scientific Learning Corporation commented that §66.1013(c), which requires coverage of specific essential knowledge and skills a designated number of times, should be reconsidered because electronic media are not linear in nature.

Agency Response. The agency disagrees and maintained language as published as proposed. Coverage for the TEKS is a requirement in statute. Electronic media are not linear in nature; however, the TEKS must be covered sufficiently.

Comment. The regional director of the Scientific Learning Corporation commented on §66.1017(c), which requires subject area and technology experts on the review panel. The commenter recommended that more than one technology expert be included on the review panel.

Agency Response. The agency agrees; however, language in §66.1017(c) does not need to be modified. The rule specifies that at least one technology expert is to be appointed on the review panel for every program submitted. This allows the flexibility for additional technology experts to be appointed.

Comment. The regional director of the Scientific Learning Corporation commented on proposed §66.1019(a)(1)(C), (D), and (E) regarding TEKS coverage and stated that the language was too specific. The commenter further stated that this may limit the content that is submitted for review.

Agency Response. The agency agrees. Language in §66.1019(a)(1)(C) was modified to address the number of opportunities that TEKS must be covered for students to demonstrate knowledge. Language in §66.1019(a)(1)(D) and (E), as published as proposed, was deleted.

Comment. The regional director of the Scientific Learning Corporation commented on §66.1025 regarding the response to the request for electronic textbooks and instructional materials. The commenter stated that this section does not address how reviewers review the electronic materials.

Agency Response. The agency provides the following clarification. Section 66.1025 does not address the review of electronic materials. This section addresses how publishers respond to a request for electronic textbooks and instructional materials.

Comment. The regional director of the Scientific Learning Corporation commented on §66.1027(f) regarding the affidavit certifying that each individual author or contributor of an electronic textbook or instructional material contributed to the content development. The commenter stated that this rule is too extreme because many contributors are involved with the content.

Agency Response. The agency disagrees and maintained language as published as proposed. Affidavits are required to ensure that authors and contributors of electronic textbooks and instructional materials are authentic and to protect the state from liability.

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING THE COMMISSIONER'S LIST OF ELECTRONIC TEXTBOOKS AND INSTRUCTIONAL MATERIALS

19 TAC §§66.1001, 66.1003, 66.1005, 66.1007, 66.1009, 66.1011, 66.1013, 66.1015, 66.1017, 66.1019, 66.1021, 66.1023, 66.1025, 66.1027, 66.1029, 66.1031, 66.1033, 66.1035, 66.1037, 66.1039, 66.1041

The new sections are adopted under the Texas Education Code, §31.0231, as added by House Bill 4294, Section 4, 81st Texas Legislature, 2009, which requires the commissioner of education to adopt rules as necessary to implement adoption of a list of electronic textbooks and instructional materials.

The new sections implement the TEC, §31.0231.

§66.1007. Manufacturing Standards and Specifications.

(a) Electronic textbooks and instructional materials included on the Commissioner's List of Electronic Textbooks and Instructional Materials shall comply with the requirements of the technical standards of the Rehabilitation Act, §508. If it is determined that good cause exists, the commissioner of education may grant an exception to this requirement.

(b) A publisher shall file a statement certifying that electronic textbooks and instructional materials submitted for consideration will meet the requirements of the technical standards of the Rehabilitation Act, §508. Each statement must be made on a form provided by the commissioner, signed by a company official, and filed on or before the deadline specified in the schedule of adoption procedures.

(c) If, during the contract period, any adopted electronic textbooks and instructional materials are revised and the commissioner determines they no longer meet the requirements of the technical standards of the Rehabilitation Act, §508, the materials shall be made compliant by the publisher without cost to the state. If it is determined that good cause exists, the commissioner may grant an exception to this requirement. This subsection applies only if the textbooks do not meet the requirements in effect at the time of the contract and does not apply if the Rehabilitation Act, §508, accessibility standards change subsequently.

§66.1009. Procedures Governing Violations of Statutes--Administrative Penalties.

(a) Administrative penalties. The commissioner of education may impose a reasonable administrative penalty against a publisher found in violation of a provision of the Texas Education Code (TEC), §31.151(a), if the publisher fails to correct the errors within the time period provided by the commissioner. An administrative penalty shall be assessed only after the commissioner has granted the publisher a hearing in accordance with the TEC, §31.151, and the Administrative Procedure Act.

(b) Penalties for failure to correct factual errors.

(1) A factual error shall be defined as a verified error of fact or any error that would interfere with student learning. The context, including the intended student audience and grade level appropriateness, shall be considered.

(2) A factual error repeated in a single item or contained in both the student and teacher components of adopted electronic textbooks and instructional materials shall be counted once for the purpose of determining penalties.

(3) A penalty may be assessed for failure to correct a factual error identified in the list of corrections submitted by a publisher or for failure to correct a factual error identified by the electronic textbooks and instructional materials review panel under §66.1031 of this title (relating to Consideration and Adoption of Electronic Textbooks and Instructional Materials) and required by the commissioner. The publisher shall correct any errors within 30 business days after receipt of notice from the commissioner.

(4) A penalty not to exceed $5,000 may be assessed for each factual error identified after the deadline established in the request for electronic textbooks and instructional materials by which publishers must have submitted corrected versions of adopted electronic textbooks and instructional materials.

(c) Categories of factual errors.

(1) Category 1. A factual error in a student component that interferes with student learning.

(2) Category 2. A factual error in a teacher component only.

(3) Category 3. A factual error in either a student or teacher component that reviewers do not consider serious.

(d) Base and per-license penalties. The base and per-license penalties shall be assessed as follows for failure to correct factual errors described in subsections (b) and (c) of this section.

(1) Category 1 error. $25,000 base plus 1.0% of sales for electronic textbooks and instructional materials on the Commissioner's List of Electronic Textbooks and Instructional Materials.

(2) Category 2 error. $15,000 base plus 1.0% of sales for electronic textbooks and instructional materials on the Commissioner's List of Electronic Textbooks and Instructional Materials.

(3) Category 3 error. $5,000 base plus 1.0% of sales for electronic textbooks and instructional materials on the Commissioner's List of Electronic Textbooks and Instructional Materials.

(e) Penalties for failure to make adopted electronic textbooks and instructional materials readily available, including teacher components, in a timely manner and with consistent access 24 hours a day and 7 days a week. The commissioner may assess penalties as allowed by law against publishers who fail to deliver adopted electronic textbooks and instructional materials, including teacher components specified by §66.1027 of this title (relating to Electronic Textbooks and Instructional Materials Offered for Adoption by the Commissioner), in accordance with provisions in the contracts.

(f) Penalties for selling adopted electronic textbooks and instructional materials with factual errors. The commissioner may assess administrative penalties in accordance with the TEC, §31.151, against a seller of adopted electronic textbooks and instructional materials.

(g) Penalties for failure to maintain websites in state-adopted products. The commissioner may assess administrative penalties against a publisher who:

(1) fails to maintain a website or provide a suitable alternative for conveying the information in the website or who otherwise fails to meet the requirements of this subsection; or

(2) fails to monitor, update, and maintain any in-house and third party electronic, web-based, or online products furnished as part of the adopted electronic textbooks and instructional materials specified in the contract for the period determined by the commissioner for adopted electronic textbooks and instructional materials.

(h) Replacement requirements. If the commissioner determines in a hearing that electronic, web-based, or online instructional materials furnished and supplied under the terms of a contract have outdated information during the contract period, the online instructional materials or information shall be updated by the publisher without cost to the state.

(i) Content update requests. The publisher must submit a request to the commissioner as specified in §66.1035 of this title (relating to Updates to Electronic Textbooks and Instructional Materials) for approval to substitute updated content or add content. The publisher shall not update or add content without prior commissioner approval. The commissioner shall respond to such a request within 30 business days after receipt of the request. Factual or software coding errors that require updates or changes shall not require commissioner approval.

(j) Content removal. The publisher agrees that electronic, web-based, or online instructional materials listed in the contract will not be altered in any way that would remove content from the curriculum or that would change content in the curriculum without prior commissioner approval. The commissioner shall respond to such a request within 30 business days after receipt of the request.

(k) Online requirements. The publisher will not allow advertising of any type to be placed in or associated with the materials. The publisher will not collect any information about the user or computer accessing the materials that would allow determination of personal information, including email addresses. The publisher will be allowed to collect information necessary for legitimate operational tasks, including authenticating and managing student access and detecting and preventing security vulnerabilities. The result of the information will be used to deliver the material and provide an educational value per the intended design. Use of such information will follow the federal Family Educational Rights and Privacy Act (FERPA).

(l) Internet links. The publisher may only add Internet links or redirect to other Internet or electronic sites as needed to correct an error or correct a broken link to the materials without the approval of the commissioner. The publisher will not redirect any user accessing the web-based or online instructional materials to other Internet or electronic sites unless a resource is no longer available or appropriate. The publishers shall provide such new or corrected Internet links to the commissioner at the time the addition or correction is made, and the commissioner shall have up to 30 business days to retroactively reject such changes.

(m) Commissioner discretion regarding penalties. The commissioner may, if circumstances warrant, waive or vary penalties contained in this section for first or subsequent violations based on the seriousness of the violation, any history of a previous violation or violations, the amount necessary to deter a future violation, any effort to correct the violation, and any other matter justice requires.

(n) Payment of fines. Each affected publisher shall issue credit to the Texas Education Agency in the amount of any penalty imposed under the provisions of this section. When circumstances warrant it, the commissioner is authorized to require payment of penalties in cash within ten business days. Each affected publisher who pays a fine for failure to deliver adopted electronic textbooks and instructional materials in a timely manner will not be subject to the liquidated damages provision in the publisher's contract for the same failure to deliver adopted electronic textbooks and instructional materials in a timely manner.

§66.1013. Request, Public Notice, and Schedule for Adopting Electronic Textbooks and Instructional Materials.

(a) The commissioner of education shall issue a request calling for electronic textbooks and instructional materials according to a cycle for foundation and enrichment subjects as determined by the commis-

sioner or according to the review and adoption cycle for subjects in the foundation curriculum and enrichment curriculum adopted by the State Board of Education. The request shall serve as notice to all publishers and to the public that bids to furnish new electronic textbooks and instructional materials to the state are being invited.

(b) At a minimum, the request for electronic textbooks and instructional materials shall contain the following:

(1) specifications for essential knowledge and skills in each subject for which bids are being invited;

(2) information regarding the technical standards of the Rehabilitation Act, §508; and

(3) a schedule of adoption procedures for electronic textbooks and instructional materials.

(c) The request for electronic textbooks and instructional materials shall require coverage of specific essential knowledge and skills a designated number of times.

(d) The commissioner will provide a minimum of 90 calendar days for content development upon the release of the request for electronic textbooks and instructional materials.

(e) Under extraordinary circumstances, the commissioner may adopt an emergency, supplementary, or revised request for electronic textbooks and instructional materials without complying with the timelines and other requirements of this section.

§66.1019. Electronic Textbooks and Instructional Materials Review Panels: Duties and Conduct.

(a) The duties of each member of an electronic textbooks and instructional materials review panel are to:

(1) evaluate all electronic textbooks and instructional materials submitted for adoption in each subject assigned to the panel to determine if essential knowledge and skills are covered in the student version of the textbook, as well as in the teacher version of the textbook. Panel members will use commissioner of education-approved procedures for evaluating coverage of the essential knowledge and skills. The approved procedures include the following.

(A) Electronic textbooks and instructional materials review panel members must participate in online training to ensure clear and consistent guidelines for determining full Texas Essential Knowledge and Skills (TEKS) coverage within the electronic textbooks and instructional materials.

(B) Electronic textbooks and instructional materials review panel members must participate in a team during the review and reach a consensus to determine if the TEKS have been covered sufficiently in the electronic textbooks and instructional materials.

(C) Electronic textbooks and instructional materials shall be evaluated for TEKS coverage at each grade level, including the number of opportunities that TEKS are addressed for students to demonstrate knowledge;

(2) submit to the commissioner a report indicating the percentage of required TEKS that each submission assigned to be evaluated by the electronic textbooks and instructional materials review panel covers;

(3) submit to the commissioner a list of any factual errors in electronic textbooks and instructional materials assigned to be evaluated by the electronic textbooks and instructional materials review panel; and

(4) as appropriate to a subject area and/or grade level, ascertain that electronic textbooks and instructional materials submitted for adoption do not contain content that clearly conflicts with the stated purpose of the Texas Education Code, §28.002(h).

(b) Electronic textbooks and instructional materials review panel members shall not accept meals, entertainment, gifts, or gratuities in any form from publishers, authors, hardware or software providers, or depositories; agents for publishers, authors, hardware or software providers, or depositories; any person who holds any official position with publishers, authors, hardware or software providers, depositories, or agents; or any person or organization interested in influencing the selection of electronic textbooks and instructional materials.

(c) A member of an electronic textbooks and instructional materials review panel shall have no contact with other members of the panel except during official meetings. Electronic textbooks and instructional materials review panel members shall not discuss electronic textbooks and instructional materials being evaluated with any party having a direct or indirect interest in adoption of electronic textbooks and instructional materials.

§66.1027. Electronic Textbooks and Instructional Materials Offered for Adoption by the Commissioner.

(a) Publishers may not submit electronic textbooks or instructional materials that have been authored by an employee of the Texas Education Agency (TEA).

(b) A teacher's component submitted to accompany student electronic textbooks and instructional materials under consideration for adoption shall be provided for the duration of the original contract and any contract extensions at no cost to the school district or open-enrollment charter school.

(c) Electronic textbooks and instructional materials adopted by the commissioner of education shall include appropriate training for teachers at no additional cost to districts or open-enrollment charter schools. Appropriate training for teachers is defined as acquiring knowledge and skills necessary to effectively use the adopted electronic textbooks and instructional materials in the classroom.

(d) Any discounts offered for numbers of users of adopted electronic textbooks and instructional materials shall be included in price information submitted with the publisher's response.

(e) The publisher shall guarantee that individual items included in the student and/or teacher component shall be available for the entire contract period at the same price. Individual component prices may be listed to show school districts and open-enrollment charter schools the replacement costs of components.

(f) Publishers shall submit to the TEA a signed affidavit certifying that each individual whose name is listed as an author or contributor of an electronic textbook or instructional material contributed to the development of the electronic textbook or instructional material. The affidavit shall also state in general terms each author's involvement in the development of the electronic textbook or instructional material.

(g) On or before the deadline established in the schedule of adoption procedures, publishers shall submit correlations of electronic textbooks and instructional materials submitted for adoption with required essential knowledge and skills. These correlations shall include essential knowledge and skills covered a certain number of times. Correlations shall be submitted in a format approved by the commissioner, which shall include an option of an electronic format.

§66.1031. Consideration and Adoption of Electronic Textbooks and Instructional Materials.

(a) The commissioner of education shall review all electronic textbooks and instructional materials submitted for consideration for adoption. The commissioner's review shall include the following:

(1) evaluations of electronic textbooks and instructional materials prepared by electronic textbooks and instructional materials review panel members, including the extent to which the materials align to the required Texas Essential Knowledge and Skills (TEKS);

(2) compliance with applicable manufacturing standards and specifications and, if applicable, technical requirements of the Rehabilitation Act, §508;

(3) recommended corrections of factual errors identified by electronic textbooks and instructional materials review panels; and

(4) prices of electronic textbooks and instructional materials submitted for adoption.

(b) Based on the review specified in subsection (a) of this section, the commissioner shall make a final decision regarding the electronic textbooks and instructional materials that will be placed on the adopted list and made available for schools. The commissioner will establish a period of time for a publisher to respond to the reasons its electronic textbooks and/or instructional materials were rejected. Electronic textbooks and/or instructional materials may be rejected for several reasons. The reasons for rejection include, but are not limited to:

(1) failure to meet the minimum essential knowledge and skills specified in the request for electronic textbooks and instructional materials;

(2) failure to meet applicable manufacturing standards and specifications or, if applicable, the technical requirements of the Rehabilitation Act, §508;

(3) failure to correct errors of fact; or

(4) content that clearly conflicts with the stated purpose of the Texas Education Code, §28.002(h).

(c) The commissioner may allow a publisher to withdraw from the adoption process after the date specified in the request for electronic textbooks and instructional materials due to recommended placement as conforming or nonconforming, manufacturing specifications required as a condition of adoption that the publisher states cannot be met, or failure to agree to make corrections required by the commissioner.

(d) The decision by the commissioner regarding the final disposition of electronic textbooks or instructional materials submitted for inclusion on the commissioner's adopted list is final and may not be appealed.

§66.1033. Statewide License.

(a) The commissioner of education may accept one or more statewide license(s) submitted by a publisher.

(b) A statewide license grants the right to use and makes a program placed on the Commissioner's List of Electronic Textbooks and Instructional Materials available to every student in the state enrolled in the subject and/or in the grade level for which the material is intended and every teacher in the state teaching the subject and/or grade level for which the materials is intended.

(c) The statewide license price should be the total amount for providing the materials as described in subsection (b) of this section. The statewide license price should not be a per-pupil price.

(d) School districts and open-enrollment charter schools will have an option to consider a statewide license submission or select from other content providers.

(e) Submission of a statewide license will not prohibit the submission of a bid based on unit price.

§66.1035. Updates to Electronic Textbooks and Instructional Materials.

(a) A publisher may submit a request to the commissioner of education for approval to update the content of state-adopted electronic textbooks and instructional materials. A publisher requesting an update shall provide the request in writing, providing a comparison that includes the changes made in the update with the corresponding sections of the state-adopted electronic textbooks and instructional materials along with access to both the updated electronic textbooks and instructional materials and the adopted version.

(b) Requests for approval of updates shall provide that there will be no additional cost to the state.

(c) Requests for approval of updates shall not be approved during the first year of the original contract unless the commissioner determines that changes in technology, curriculum, or other reasons warrant the updates.

(d) Publishers submitting requests for approval of updates must certify in writing that the new material meets the applicable essential knowledge and skills and is free from factual errors.

(e) The commissioner may request publishers to update electronic textbooks and instructional materials at a minimum to accurately reflect current knowledge or information. Publishers shall provide details of the changes at least 30 business days before the changes are implemented. The commissioner must review the new content before it is included in the materials. The commissioner shall respond to such a request within 30 business days after receipt of the request.

(f) Publishers shall notify the commissioner before making electronic design changes and/or updates that improve performance, design, and technology capabilities, including updates to the navigational features or management system, that enhance the operation and usage for students and teachers but do not include changes to the applicable essential knowledge and skills coverage or new content. Publishers shall provide details of the changes at least 30 business days before the changes are implemented.

(g) A publisher of adopted electronic textbooks and instructional materials may provide alternative formats for use by school districts and open-enrollment charter schools if the cost to the state and schools is equal to or less than the cost of the original product.

(h) Alternative formats may be developed and introduced at a time when the subject or grade level is not scheduled in the cycle to be considered for at least two years, in conformance with the procedures for adoption of other state-adopted materials.

(i) Publishers must notify the commissioner in writing if they are providing commissioner-approved products in alternative formats.

(j) Publishers are responsible for informing districts and open-enrollment charter schools of the availability of the alternative formats and for accurate fulfillment of these orders.

(k) The commissioner may add alternative formats of commissioner-adopted products to the list of available products disseminated to school districts and open-enrollment charter schools.

(l) The commissioner may remove an adopted electronic textbook or instructional material from the list of available products. Before the commissioner removes an adopted electronic textbook or instructional material from the list of available products, the removal must be recommended by a panel of recognized experts in the subject

area of the electronic textbook or instructional material and experts in education technology.

§66.1037. Delivery of Adopted Electronic Textbooks and Instructional Materials.

(a) Each publisher is required to have adopted electronic textbooks and instructional materials available for access to school districts and open-enrollment charter schools throughout the entire adoption period.

(b) Each publisher shall guarantee access to adopted electronic textbooks and instructional materials at least ten business days before the opening day of school of the year for which the electronic textbooks and instructional materials are ordered if the textbooks and materials have been ordered by a date specified in the sales contract. If the publisher cannot meet this deadline, the publisher shall notify affected school districts and open-enrollment charter schools of the date on which each title will be available.

(c) Payments from the school district or open-enrollment charter school for adopted electronic textbooks and instructional materials shall be made directly to the publisher or to any agent or trustee designated in writing by the publisher.

§66.1039. Sample Copies of Electronic Textbooks and Instructional Materials for School Districts.

(a) A publisher shall provide each school district and open-enrollment charter school with information that fully describes adopted electronic textbooks and instructional materials. Descriptive information provided to each school district or open-enrollment charter school shall be identical.

(b) Upon request by the textbook coordinator of a school district or open-enrollment charter school, a publisher shall provide one complete sample of adopted electronic textbooks and instructional materials. The sample may be delivered as a web-based or online material as determined by the publisher. Samples of learning systems and electronic, visual, or auditory media may be provided in demonstrations or representative format, provided that identical samples are provided to each school district or open-enrollment charter school. A school district or open-enrollment charter school receiving a sample shall not make a copy of that sample without the explicit permission of the publisher.

(c) Samples supplied to school districts or open-enrollment charter schools shall be provided and distributed at the expense of the publisher. No state or local funds shall be expended to purchase, distribute, or ship sample materials. Publishers may make arrangements with school districts or open-enrollment charter schools to retrieve samples after local selections are completed. Publishers shall set a reasonable time period for school district or open-enrollment charter school review of the sample.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 1, 2010.

TRD-201006209
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: November 21, 2010
Proposal publication date: April 30, 2010
For further information, please call: (512) 475-1497

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SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING STATE-DEVELOPED OPEN-SOURCE TEXTBOOKS

19 TAC §§66.1101, 66.1103, 66.1105, 66.1107, 66.1109, 66.1111, 66.1113, 66.1115, 66.1117

The new sections are adopted under the Texas Education Code, §31.076, as added by House Bill 2488, 81st Texas Legislature 2009, which authorizes the commissioner of education to adopt rules necessary to implement the purchase of state-developed open-source textbooks.

The new sections implement the TEC, §§31.071-31.077.

§66.1107. Manufacturing Standards and Specifications.

(a) All state-developed open-source textbooks shall comply with the requirements of the technical standards of the Rehabilitation Act, §508. If it is determined that good cause exists, the commissioner of education may grant an exception to this requirement.

(b) A publisher shall file a statement certifying that state-developed open-source textbooks submitted for consideration will meet the requirements of the technical standards of the Rehabilitation Act, §508. Each statement must be made on a form provided by the commissioner, signed by a company official, and filed on or before the deadline specified in the schedule of adoption procedures.

(c) If, during the contract period, any state-developed open-source textbooks are revised and the commissioner determines they no longer meet the requirements of the technical standards of the Rehabilitation Act, §508, the materials shall be made compliant by the publisher without cost to the state. If it is determined that good cause exists, the commissioner may grant an exception to this requirement. This subsection applies only if the textbooks do not meet the requirements in effect at the time of the contract and does not apply if the Rehabilitation Act, §508, accessibility standards change subsequently.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING ACCEPTABLE CONDITION OF PUBLIC SCHOOL TEXTBOOKS, ELECTRONIC TEXTBOOKS, AND TECHNOLOGICAL EQUIPMENT

19 TAC §§66.1201, 66.1203, 66.1205

The new sections are adopted under the Texas Education Code, §31.104(d), as amended by House Bill 1332, 81st Texas Legislature, 2009, which requires the commissioner to adopt by rule criteria for determining whether a textbook, including an electronic textbook, and technological equipment are returned in an acceptable condition.

The new sections implement the TEC, §31.104(d).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
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Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 172. TEMPORARY AND LIMITED LICENSES

SUBCHAPTER B. TEMPORARY LICENSES

22 TAC §172.5

The Texas Medical Board (Board) adopts amendments to §172.5, concerning Visiting Physician Temporary Permits (VPTP), without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8851) and will not be republished.

The amendment provides that applicants for KSTAR permits who have prior or current disciplinary orders from a licensing entity related to professional boundaries or have been convicted of a felony are not eligible for a permit unless otherwise determined by the Board.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §§153.001, 155.009, and 155.101, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 4, 2010.

TRD-201006253
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: November 24, 2010
Proposal publication date: October 1, 2010
For further information, please call: (512) 305-7016

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CHAPTER 175. FEES AND PENALTIES

22 TAC §175.1

The Texas Medical Board (Board) adopts amendments to §175.1, concerning Application Fees, with changes to the proposed text as published in the September 17, 2010, issue of the *Texas Register* (35 TexReg 8468). The text of the rule will be republished.

The amendments to §175.1 eliminate application fees for regular temporary licenses and distinguished professor temporary licenses and add the fee amount for a regular temporary license to the application fee for full licensure, provisional licenses, telemedicine licenses and administrative license. In addition, due to fees associated with Texas Online, fees are increased an additional $10 for each of the licenses mentioned.

Section 175.1 is adopted with changes because §1530.51(d)(9) of the Medical Practice Act provides that the board may not charge more than $700 (excluding surcharges) for a reinstated licensed after cancellation for cause. The proposed increase in the fee for reissuance of licenses following revocation, which is considered the same as a reinstatement of a license after cancellation for cause, would have violated the Medical Practice Act, and therefore that fee is to remain the same.

No comments were received regarding adoption of the rule.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §153.001 and §155.0031, Texas Occupations Code.

§175.1. Application Fees.

The board shall charge the following fees for processing an application for a license or permit:

(1) Physician Licenses:

(A) Full physician license (includes surcharge of $215)--$1002.

(B) Telemedicine license (includes surcharge of $215)--$1002.

(C) Administrative medicine license (includes surcharge of $215)--$1002.

(D) Reissuance of license following revocation (includes surcharge of $205)--$885.

(E) Temporary license:

(i) State health agency--$50.

(ii) Visiting physician--$-0-.

(iii) Visiting professor--$167.

(iv) National Health Service Corps--$-0-.

(v) Faculty temporary license (includes surcharges of $280)--$737.

(vi) Postgraduate Research Temporary License--$-0-.

(vii) provisional license--$107.

(F) Licenses and Permits relating to Medical Education:

(i) Initial physician in training permit (includes surcharge of $5)--$202.

(ii) Physician in training permit for program transfer (includes surcharge of $4)--$131.

(iii) Evaluation or re-evaluation of postgraduate training program--$250.

(iv) Physician in training permit for applicants performing rotations in Texas (includes surcharge of $3)--$120.

(2) Physician Assistants:

(A) Physician assistant license (includes surcharge of $5)--$205.

(B) Reissuance of license following revocation (includes surcharge of $5)--$205.

(C) Temporary license--$107.

(3) Acupuncturists/Acudetox Specialists/Continuing Education Providers:

(A) Acupuncture licensure (includes surcharge of $5)--$305.

(B) Temporary license for an acupuncturist--$107.

(C) Acupuncturist distinguished professor temporary license--$50.

(D) Acudetox specialist certification (includes surcharge of $2)--$52.

(E) Continuing acupuncture education provider--$50.

(F) Review of a continuing acupuncture education course--$25.

(G) Review of continuing acudetox acupuncture education courses--$50.

(4) Non-Certified Radiologic Technician permit (includes surcharge of $2)--$52.

(5) Non-Profit Health Organization initial certification--$2,500.

(6) Surgical Assistants:

(A) Surgical assistant licensure--$300.

(B) Temporary license--$50.

(7) Criminal History Evaluation Letter--$100.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 4, 2010.

TRD-201006254
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: November 24, 2010
Proposal publication date: September 17, 2010
For further information, please call: (512) 305-7016

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PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 273. GENERAL RULES

22 TAC §273.4

The Texas Optometry Board adopts amendments to §273.4, concerning Fees (Not Refundable), without change to the proposed text published in the September 3, 2010, issue of the *Texas Register* (35 TexReg 8046).

The amendments decrease the license renewal fees by $8.00 in order to match receipts with the legislative appropriation for the agency. Amendments also change the late renewal fee, the late fee for failure to timely obtain continuing education, and the fee for the Retired License to the amount of the inactive renewal fee since these fees are based on the license renewal fee. Amendments also clarify that the renewal fee includes an amount for the Peer Assistance Program.

No comments were received.

The amendment is adopted under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.152, 351.304, 351.308 and 351.265; and Senate Bill 1, 81st Legislature, Regular Session. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession; §351.152 as granting the Board the authority to establish by rule reasonable and necessary fees to cover the costs of administering the act; §351.304 as setting the requirements for late renewal fees, §351.308 as setting the fee for delayed continuing education compliance and §351.265 as setting the fee for Retired License. Senate Bill 1 authorizes the funding mechanism for the agency.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2010.

TRD-201006400
Chris Kloeris
Executive Director
Texas Optometry Board
Effective date: November 28, 2010
Proposal publication date: September 3, 2010
For further information, please call: (512) 305-8502

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 135. AMBULATORY SURGICAL CENTERS

SUBCHAPTER A. OPERATING REQUIREMENTS FOR AMBULATORY SURGICAL CENTERS

25 TAC §§135.2, 135.15, 135.26

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §§135.2, 135.15, and 135.26, concerning the regulation of ambulatory surgical centers without changes to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5714) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments are necessary to comply with legislation passed during the 81st Legislature, Regular Session, 2009.

House Bill 643 added Health and Safety Code, Chapter 259, which requires ambulatory surgical centers to comply with qualification standards for employment of surgical technologists. Senate Bill 203 amended Health and Safety Code, Chapter 98, involving the reporting of healthcare-associated infections and preventable adverse events in certain health care facilities to the department.

The department regulates ambulatory surgical centers as required by Health and Safety Code, Chapter 243.

SECTION-BY-SECTION SUMMARY

An amendment to §135.2(21) adds the definition of "Surgical technologist" as defined in Health and Safety Code, Chapter 259. An amendment to §135.15 requires ambulatory surgical centers to adopt, implement, and enforce policies related to the employment of surgical technologists.

An amendment to §135.26 requires ambulatory surgical centers to report to the department incidents of certain healthcare-associated infections and preventable adverse events, in accordance with Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events). The department will promulgate rules to set forth the detailed requirements for reporting. This information will allow the department to make available patient safety information in Texas, including information related to healthcare-associated infections and preventable adverse events in a format that is available on an Internet website.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §243.009, concerning rules and minimum standards for the licensing and regulation of ambulatory surgical centers; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 98, concerning the reporting the of healthcare-associated infections; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006391
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: November 25, 2010
Proposal publication date: July 2, 2010
For further information, please call: (512) 458-7111 x6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 305. CONSOLIDATED PERMITS

SUBCHAPTER P. EFFLUENT GUIDELINES AND STANDARDS FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) PERMITS

30 TAC §305.541

The Texas Commission on Environmental Quality (commission or TCEQ) adopts the amendment to §305.541 *without changes* to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5744) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The rulemaking adopts by reference the new United States Environmental Protection Agency (EPA) construction storm water rules, which were adopted in Title 40 Code of Federal Regulations (CFR) Part 450 and became effective on February 1, 2010. The rule applies to construction activities that are already required to be authorized under the Texas Pollutant Discharge Elimination System (TPDES) program, meaning that it applies to sites that are one or more acres in size, as well as smaller sites that are part of a larger common plan of development or sale that will disturb one or more acre. This rule requires all regulated construction activities to meet a series of non-numeric effluent limitations established to provide minimum national re-

quirements. Non-numeric effluent limits are narrative requirements for best management practices to address erosion, sediment control, soil stabilization, and pollution prevention that prevent or minimize the amount of construction site pollutants, such as sediment, in storm water runoff. The requirements in the rule are similar to the existing requirements in the TPDES Construction General Permit (CGP), TXR150000, reissued on March 5, 2008.

The rule also requires a numeric effluent limit for turbidity. On September 20, 2010, as a result of a court challenge to these new rules, the United States Court of Appeals for the Seventh Circuit (Petition Number 09-4113), at the request of EPA, remanded the administrative record and is holding the case in abeyance. The remand is to allow EPA time to re-consider the rule and to fully respond to comments received during its rulemaking that related to the turbidity limit of 280 nephelometric turbidity units. EPA also asked the court to vacate the turbidity limit of 280 nephelometric turbidity units due to identified flaws in their method of calculation, but the court declined to do so.

The commission has taken a position that until revised federal rules are promulgated numeric turbidity limitations will not be implemented in TCEQ issued construction storm water permits. The commission adopts 40 CFR Part 450 as it currently exists and does not intend to prospectively adopt any future amendments to the federal regulations at this time.

In its motion before the court, EPA stated that it intended to reexamine the turbidity effluent limit through a narrowly tailored notice and comment (public participation) rulemaking and, if necessary, revise that portion of the limit before proceeding with its defense of the rule. The court will not be involved in the rulemaking. Following conclusion of the federal rulemaking, the fate of the court challenge will be determined.

The CGP is due for renewal in 2013. The non-numeric effluent limitations will be incorporated into the renewal of the CGP. A revised turbidity limit will be incorporated only if the EPA has adopted a revised turbidity limit by the time the CGP renewal is drafted. Construction site operators operating under authorization of the CGP will not be required to comply with the new requirements until the CGP is reissued.

Any individual construction storm water permit issued after the adoption of this rule will include the federal non-numeric limits and a numeric limit for turbidity only if EPA has adopted a revised turbidity limit. The federal non-numeric limits will also be included in the mining sectors (Sectors G, H, and J) of the renewal of the TPDES Multi-Sector General Permit, (MSGP) TXR05000, which is expiring August 13, 2011. However, due to EPA's identification of flaws in their method of calculating the turbidity limit currently included in the rules, a revised turbidity limit will be incorporated into the 2011 revision of the MSGP only if EPA has adopted a revised turbidity limit prior to the issuance of the 2011 MSGP.

Currently, §305.541 adopts by reference certain parts of 40 CFR that were in effect at the time Texas was awarded delegation of the National Pollutant Discharge Elimination System (NPDES) program and specific parts that were adopted after delegation. This rulemaking will add 40 CFR Part 450 to the list of parts adopted after delegation.

SECTION DISCUSSION

Adopted §305.541 adds the adoption by reference of 40 CFR Part 450 as amended, which contains regulations to control storm water from regulated construction sites.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rule change is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as defined in the statute.

A "major environmental rule" is defined in Texas Government Code, §2001.0225(a) as applying to rules adopted by a state agency that: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The intent of the adopted rule is to modify TCEQ's rules to implement new federal storm water regulations affecting construction activities that disturb one or more acres, and smaller sites that are part of larger common plans of development that will disturb one or more acres. 40 CFR Part 450 has new requirements that took effect on February 1, 2010. These rules are adopted by reference in §305.541. Since these rules are adopted by reference to conform to both federal rules and the NPDES delegation agreement; and this rule does not exceed any express requirement of state law or adopted solely under the general powers of TCEQ, the commission concludes that this rule does not meet the definition of "major environmental rule."

The commission invited public comment regarding the draft regulatory impact analysis determination during the comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rule and performed an assessment of whether the adopted rule change constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rule change is to incorporate new federal storm water regulations into state rules.

Promulgation and enforcement of this rule is neither a statutory nor a constitutional taking of private real property because it involves only additional control of storm water runoff during construction activities on sites disturbing one acre or more.

There are additional storm water control requirements imposed on private real property during construction activities that disturb one or more acres, but the benefits to society are increased by reducing discharges of pollutants from construction sites. The rule change does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond what would otherwise exist in the absence of the regulation. Therefore, this rule change does not constitute a taking under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination

Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies. This rulemaking fulfills the CMP goal to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on July 29, 2010. The comment period closed on August 2, 2010. The commission received written comments from the Lower Colorado River Authority (LCRA) and the Texas Department of Transportation (TxDOT). Representatives from Bullock, Bennett, and Associates; Harris County Flood Control District; LCRA; M & S Engineering; and TxDOT attended the public meeting but did not comment.

RESPONSE TO COMMENTS

LCRA stated that it did not have specific comments but wanted to express its ongoing interest in the revisions to the CGP. LCRA noted the unique nature of its linear transmission line construction projects. LCRA said it looks forward to participating in the development of revisions to the CGP and any related guidance documents.

The commission appreciates the LCRA's interest. No changes were made to the rule.

TxDOT's comments related to the preamble and not to the rule. TxDOT disagreed with the statements regarding the ability of well-managed construction sites being able to meet the turbidity limit with standard best management practices and the cost being insignificant. TxDOT stated that on many of its projects, flocculants would be required to meet the turbidity limit. TxDOT also stated that the cost of compliance with the turbidity limit will be expensive for TxDOT.

The preamble was revised to reflect EPA's decision to re-examine the turbidity limit due to identified flaws in their method of calculating the limit established in 40 CFR Part 450. However, EPA may promulgate a revised turbidity limit that will be incorporated into the applicable TPDES permits. No change was made to the rule language.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

The adopted amendment implements 40 Code of Federal Regulations Part 450.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 5, 2010.

TRD-201006378
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: November 25, 2010
Proposal publication date: July 2, 2010
For further information, please call: (512) 239-0177

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 370. LICENSE RENEWAL

40 TAC §370.2, §370.3

The Texas Board of Occupational Therapy Examiners (TBOTE) adopts an amendment to §370.2, concerning Late Renewal, and new §370.3, Restoration of a Texas License, with changes to the proposed text as published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7722).

The amendment and new section separate late renewal requirements from restoration requirements and explain methods to return to licensure.

No comments were received regarding adoption of the amendment and new section.

The amendment and new section are adopted under the Occupational Therapy Act, Occupations Code, Title 3, Subtitle H, Chapter 454, which provides the TBOTE with the authority of adopt rules consistent with this Act to carry out the duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by these sections.

§370.2. Late Renewal.

(a) A renewal application is late if all required materials are not postmarked prior to the expiration date of the license. Licensees who do not complete the renewal process prior to the expiration date are subject to late fees as described. Likewise a renewal completed online must be date and time stamped prior to the expiration date or it is late and subject to late fees as described.

(1) If the license has been expired for 90 days or less, the person may renew the license by:

(A) submitting the renewal fee and the board approved late fee; and

(B) reporting completion of the required number of contact hours of Continuing Education.

(2) If the license has been expired for more than 90 days, but less than one year, the person may renew the license by:

(A) submitting the renewal fee and the board approved late fee; and

(B) providing copies of continuing education activities and completing the CE submission form.

(b) Military Service.

(1) If a reserve status licensee is called into active military service, and his or her license expires during service, the licensee may follow the requirements for renewal with no penalty if the licensee:

(A) submits the renewal within 90 days after return to reserve status;

(B) submits evidence of active service and its inclusive dates.

(2) A reserve status licensee who is called into active military service will have 6 additional months after release from active military service to submit proof of completion of the 30 required CE hours as per Chapter 367 of this title (relating to Continuing Education).

§370.3. Restoration of a Texas License.

(a) The board may restore a license to a person who was licensed in Texas, moved to another state or US territory, is currently licensed in another US state or territory, and that license has not been suspended, revoked, cancelled, surrendered or otherwise restricted for any reason if the person shall meet the following requirements:

(1) make application for licensure to the board on a form prescribed by the board which includes a recent passport type photo;

(2) submits to the board verification of all the state licenses held since leaving Texas. At least one must be current and in good standing, and any disciplinary actions must be reported to the board;

(3) pass the jurisprudence exam;

(4) pay the restoration fee; and

(5) completes all requirements for licensure within one year from the date of application.

(b) If the person's Texas license has been expired more than one year and less than two years, the person shall:

(1) make application for licensure to the board on a form prescribed by the board, which includes a recent passport type photo;

(2) pass the board jurisprudence examination;

(3) submit copies of the completed continuing education showing 45 hours of continuing education as per Chapter 367 of this title (relating to Continuing Education) with a minimum of 30 hours in Type 2;

(4) pay the restoration fee; and the renewal fee; and

(5) complete all requirements for licensure within one year from the date of the application.

(c) A former licensee whose Texas license is expired and holds no current state or US territory license may return to Texas licensure by:

(1) complete a re-entry course through an accredited college or university, and submit the certificate of completion or transcript to the board; or

(2) obtain an advanced occupational therapy degree, with an official transcript sent to the board; or

(3) retake the NBCOT examination "for licensure purposes only" and the scores reported to Texas from NBCOT; and submit copies of the completed continuing education showing 45 hours of continuing education as per Chapter 367 of this title (relating to Continuing Education), with a minimum of 30 hours in Type 2;

(A) submit a board approved application which includes a recent passport type photo;

(B) pass the jurisprudence exam;

(C) pay the restoration fee;

(D) complete the requirements for licensure within one year from the date of application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2010.

TRD-201006401
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Effective date: November 28, 2010
Proposal publication date: August 27, 2010
For further information, please call: (512) 305-6900

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PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 745. LICENSING
SUBCHAPTER F. BACKGROUND CHECKS

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§745.615, 745.623, 745.687, and 745.693, concerning background checks, in its Licensing chapter. The amendments to §745.687 and §745.693 are adopted with changes to the proposed text published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 7007). The amendments to §745.615 and §745.623 are adopted without changes to the proposed text and will not be republished.

The rules allow a prospective foster or adoptive parent, or any person in the home, to be eligible for a risk evaluation for any criminal conviction currently monitored by the Licensing Division of DFPS provided the criminal conviction does not violate certain crimes noted in the federal Adoption and Safe Families Act, and: (1) the criminal conviction is more than 20 years old, or (2) one foster or adoptive parent is related to or has a long-standing significant relationship with the child. The rules also require information regarding a prospective foster or adoptive parent's relationship with a child to be submitted as part of a person's risk evaluation. Additional changes related to background checks include: (1) clarifying the term "professional" so that staff may more easily identify who is not required to complete a background check; (2) requiring that background checks for school-age and before or after-school programs be submitted

online through the DFPS website; and (3) requiring every person in the foster home to provide addresses where the person has lived outside the State of Texas any time during the previous five years preceding the date of the background check request.

The amendment to §745.615 clarifies the current exception for the background check requirement for certain professionals who have a background check conducted through another governmental entity only applies when: (1) the professional will only be at the operation in an official capacity; and (2) for day-care operations written parental consent is obtained before the professional is allowed to have unsupervised access to a child in care.

The amendment to §745.623: (1) revises subsection (a) to clarify that every person requiring a background check, not just foster and adoptive parents, must provide any addresses, including counties, where a person has lived outside the state of Texas any time during the five years preceding the date of the background check request; and (2) requires school-age and before or after-school programs to submit their background checks on-line through the DFPS website.

The amendment to §745.687 requires, as relevant, information about a prospective foster or adoptive parent's relationship to a child be included as part of the parent's risk evaluation.

The amendment to §745.693 allows a prospective foster or adoptive parent, or any person in the home, to be eligible for a risk evaluation for any criminal conviction currently monitored by the Licensing Division of DFPS provided the criminal conviction does not violate certain crimes noted in the federal Adoption and Safe Families Act, and: (1) the criminal conviction is more than 20 years old, or (2) one foster or adoptive parent is related to or has a longstanding significant relationship with the child.

The amendments will function by increasing the number of kinship placements, as well as the number of children in more permanent homes. Children tend to benefit from kinship placements, since they generally provide love and care in a familiar setting; provide parents with a sense of hope that children will remain connected to their birth families; enable children to live with people they know and trust; reinforce a child's sense of cultural identity and positive self-esteem; help a child make and sustain extended family connections; continue lifelong family traditions and memories; and create a sense of stability in the life of a child.

During the comment period, DFPS received three comments and three questions. One commenter, who did not identify her organization or role in child care, generally supported the changes. The other two commenters were child day-care providers. Questions were answered in individual responses to the commenters and are not addressed in this preamble.

Comment concerning §745.615: One commenter disagrees with allowing any person to have a "waiver" for the background check requirements.

Response: DFPS is adopting this section without change. The rule being changed in the proposal clarifies the current exception for professionals who have a background check conducted through another government entity only applies when: (1) the professional will be at the operation in an official capacity; and (2) for day-care operations, written parental consent is obtained before the professional is allowed to have unsupervised access to a child in care. This exception prevents duplication of effort by multiple state agencies.

Comment concerning §745.623: One commenter supports the change.

Response: DFPS is adopting this section without change.

Although no comments were received concerning §745.687 and §745.693, DFPS is adopting these rules with changes. The proposal for §745.693 allows a prospective foster or adoptive parent, or any person in the home, to be eligible for a risk evaluation for any criminal conviction currently monitored by the Licensing Division of DFPS if: (1) the conviction does not violate federal criminal restrictions, and (2) the prospective foster or adoptive parent is related to or has a significant longstanding relationship with the foster or adoptive child. DFPS is also allowing a risk evaluation for any conviction that is more than 20 years old, as long as it is also not a violation of the federal criminal restrictions. Because of this change, a cite is also being updated in §745.687.

The federal restrictions include a permanent bar on felony convictions for: (1) child abuse or neglect; (2) spousal abuse; (3) a crime against children; or (4) a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery. The federal restrictions also include a temporary bar for any felony convictions in the last five years for physical assault, battery, or a drug-related offense.

DIVISION 2. REQUESTING BACKGROUND CHECKS

40 TAC §745.615, §745.623

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.056.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 4, 2010.

TRD-201006259
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: December 1, 2010
Proposal publication date: August 13, 2010
For further information, please call: (512) 438-3437

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DIVISION 4. EVALUATION OF RISK BECAUSE OF A CRIMINAL CONVICTION OR A CENTRAL REGISTRY FINDING OF CHILD ABUSE OR NEGLECT

40 TAC §745.687, §745.693

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.056.

§745.687. What must I include in my request for a risk evaluation based on criminal history?

You must include the following:

(1) A completed Request for Risk Evaluation Based on Past Criminal History or Central Registry Findings form;

(2) A valid rationale of why the person does not pose a risk to the health or safety of children;

(3) A copy of the record of judicial finding or conviction;

(4) If the individual was incarcerated:

(A) A copy of local, state, or federal release order;

(B) The date the individual was released from incarceration; and

(C) If applicable, the terms and conditions of parole;

(5) If the person was given a probated sentence, information related to the terms and conditions of the probation, including documentation that the person paid all court costs and supervision fees and court-ordered restitution and fines;

(6) If the individual received deferred adjudication, include the date that the probation was or will be completed;

(7) The nature and seriousness of the crime for which he was convicted;

(8) The extent and nature of the person's past criminal history;

(9) Age of the person when the crime was committed;

(10) The time that has elapsed since the person's last criminal activity;

(11) Evidence of rehabilitative effort;

(12) The conduct and work activities of the person;

(13) Other evidence of the person's present fitness, including letters of recommendation from the prosecuting attorney, law enforcement, and correctional officers who were involved in the case;

(14) Documentation showing that the person has maintained a record of steady employment, has supported his children, has maintained a record of good conduct, and has paid any outstanding court costs, fees, fines, and restitution related to the conviction or deferred adjudication;

(15) If the person is an employee or volunteer or potential employee or volunteer, information about his anticipated job responsibilities, plans for supervision, and hours and days of service; and

(16) If any person is eligible for a risk evaluation according to §745.693(b)(2) of this title (relating to In what circumstances can someone with a criminal history be present in a child-care operation?), information about the foster or adoptive parent's relationship to the foster or adoptive child.

§745.693. In what circumstances can someone with a criminal history be present in a child-care operation?

(a) Except for a person described in subsection (b) of this section, the following chart lists the types of criminal convictions that we monitor, whether the person with the conviction is eligible for a risk evaluation, and whether he may be present in a child-care operation while children are in care pending the outcome of the risk evaluation: Figure: 40 TAC §745.693(a)

(b) A prospective foster or adoptive parent, or any person that is required to undergo a background check because of the foster or adoptive parent application, is eligible for a risk evaluation for any criminal conviction listed in subsection (a) of this section if the criminal conviction does not violate the federal restrictions outlined in 42 U.S.C. §671(a)(20)(A) and:

(1) It has been more than 20 years since the date of the criminal conviction; or

(2) The prospective foster or adoptive parent is related to or has a significant longstanding relationship with the foster or adoptive child.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 4, 2010.

TRD-201006260
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: December 1, 2010
Proposal publication date: August 13, 2010
For further information, please call: (512) 438-3437

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CHAPTER 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§746.103, 746.105, 746.201, 746.301, 746.305, 746.307, 746.405, 746.501, 746.605, 746.607, 746.613, 746.627, 746.631, 746.703, 746.801, 746.901, 746.1011, 746.1019, 746.1021, 746.1023, 746.1027, 746.1029, 746.1103, 746.1105, 746.1107, 746.1201, 746.1203, 746.1309, 746.1311, 746.1313, 746.1317, 746.1323, 746.1325, 746.1403, 746.2201, 746.2203, 746.2205, 746.2207, 746.2505, 746.2507, 746.2509, 746.2607, 746.2707, 746.2909, 746.3103, 746.3107, 746.3205, 746.3301, 746.3303, 746.3305, 746.3315, 746.3401, 746.3403, 746.3405, 746.3409, 746.3411, 746.3427, 746.3503, 746.3505, 746.3601, 746.3603, 746.3705, 746.3801, 746.3903, 746.3905, 746.4003, 746.4213, 746.4215, 746.4315, 746.4509, 746.4601, 746.4603, 746.4605, 746.4803, 746.4805, 746.4901, 746.4907, 746.5003, 746.5101, 746.5103, 746.5105, 746.5205, 746.5301, 746.5311, 746.5401, 746.5605, and 746.5609; the repeal of §§746.1005, 746.1617, 746.1711, 746.1803, 746.2107,

746.2301, 746.2809, 746.2811, 746.4511, 746.4607, 746.4609, 746.4903, 746.5011, 746.5201, 746.5203, 746.5603, 746.5607; and new §§746.805, 746.2809, 746.3316, 746.4423, 746.4607, 746.4609, 746.4751, 746.4908, 746.4915, 746.4951, 746.4953, 746.4955, 746.4971, 746.5201 - 746.5204, 746.5603, and 746.5607, in its Minimum Standards for Child-Care Centers chapter. The amendments to §§746.405, 746.1011, 746.1021, 746.2505, 746.3301, 746.4901, and 746.4907 are adopted with changes to the proposed text published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4909). All other rules listed in the preamble are adopted without changes to the proposed text and will not be republished. Also in this issue of the *Texas Register,* DFPS is withdrawing the amendments to §§746.1601, 746.1609, 746.2101, and 746.2103; and new §746.1617 and §746.1803, which were also proposed in the June 11, 2010, issue of the *Texas Register.*

DFPS is required by Chapter 42 of the Human Resources Code (HRC) to evaluate minimum standard rules at least every six years. In addition, part of Licensing's business plan is to review, analyze, and update rules to strengthen the protection of children in out-of-home care and improve providers' understanding of the rules. The rules are revised to clarify current rule and update rules with current practices in the industry.

In order to update the minimum standards, input was obtained from providers, child-care workgroups, provider associations, and Licensing staff. In addition, the changes incorporated were based on the review of minimum standards from other states, available research and literature relating to child-care, and health and safety practices recommended by experts, such as the Consumer Products Safety Commission (CPSC), the American Academy of Pediatrics (AAP), United States Department of Agriculture (USDA), the National Highway Transportation Safety Administration (NHTSA), as well as Caring For Our Children, National Health and Safety Performance Standards, 2nd Edition, which is a publication developed collaboratively by the American Academy of Pediatrics, American Public Health Association and National Resource Center for Health and Safety in Child Care.

Some of the significant changes are summarized below:

Subchapter A, Purpose and Definitions, is updated to include definitions of age-appropriate and inflatable.

Subchapter B, Administration and Communication, now includes a requirement for centers to notify Licensing when there is a planned closure for five or more consecutive business days if they are not caring for children. This subchapter also clarifies that providers must continue to follow the state's general requirement for reporting suspected communicable disease. This is due to a change in 25 TAC Chapter 97 Subchapter A (relating to Control of Communicable Diseases) that no longer specifies child care in the rule. Other changes in this subchapter require providers to include in their policies an emergency preparedness plan, background check information must be kept confidential, cellular phones at an operation must direct emergency personnel to the operation when calling 911, and providing information to a mother of her right to breastfeed and you must provide a comfortable place for this to occur.

Subchapter C, Record Keeping, is updated to allow for electronic tracking and records retention, now requires photo identification to be included in personnel records, requires daily tracking of when care for a child begins and ends, and clarifies school information is not required if the center is located at the school.

Subchapter D, Personnel, changes to this chapter include clarifying the intent of the current requirement that a director be routinely present to adequately meet the responsibilities of the position and to ensure compliance with all minimum standards, defining *full time* as 30 hours instead of the previous 40 hours per week, expanding substituted experience to include teaching pre-kindergarten, expanding credit courses for child development, clarifying that a certificate of coursework completion meets minimum qualifications, clarifying that caregivers must be free from the personal use of electronic devices, expanding annual training topics, and allowing web-based learning and training.

Subchapter F, Developmental Activities and Activity Plan, is updated to require outdoor play to be scheduled for morning and afternoons. Based on the input from the day-care temporary workgroup, rules in this subchapter are updated to allow screen time activity, but it must be included in the written activity plan and must be related to planned activities, be age appropriate, and not last more than two hours a day. In addition, screen time activities are prohibited for children under two years of age.

Subchapter G, Basic Care Requirements for Children With Special Care Needs, is deleted. The only rule in this subchapter is moved to Subchapter F, relating to Developmental Activities and Activity Plans, so provisions for children with special needs are included during activity planning.

Subchapter I, Basic Care Requirements for Toddlers, is updated to include morning and afternoon opportunities for outdoor play; and requires any training cups used to have the child's first name and last initial on them, be color coded, or cleaned and sanitized between each use.

Subchapter J, Basic Care Requirements for Pre-Kindergarten Age Children, and Subchapter K, Basic Care Requirements for School-Age Children, are updated to require the opportunity for outdoor play for pre-kindergarten age and school-age children in the morning and afternoon.

Subchapter Q, Nutrition and Food Service, is updated to reflect practices identified by the Department of State Health Services Obesity Prevention Program and the Child and Adult Care Food Program. The changes include limiting the type and amount of juice children over the age of 12 months may be served; lowers the portion sizes based on the age of the child; and drinking water must be available and served during snack times, mealtime, and activity play.

Subchapter R, Health Practices, lowers the length of time an object must soak in disinfectant solution to two minutes; clarifies which commercial products qualify as disinfecting solutions; clarifies what safety mechanisms may be used (or allows a caregiver's hand to remain on the child at all times) when diapering a child; amends the rule regarding fever to be consistent with current AAP recommendations; and clarifies that providers must continue to follow the communicable disease exclusions as outlined by the Department of State Health Services.

Subchapter S, Safety Practices, is updated to clarify that the use of audio or video monitoring systems is allowed, deletes the vaccination requirement for ferrets, and states that non-glass thermometers are preferred in first-aid kits.

Subchapter T, Physical Facilities, is updated to allow for a center to share indoor activity space (excluding classrooms) and outdoor activity space with another program while children are in care, as long as the center has provided Licensing with a written plan specifying how caregivers will supervise and account

for children in care. This subchapter is also updated to include new safety standards for use of lofts that are designed and used as an extension of a classroom.

Subchapter U, Indoor and Outdoor Active Play Space and Equipment, is renamed so it includes all active play equipment, both indoor and outdoor. Other changes to this subchapter are incorporated based on the CPSC Public Playground Safety Handbook, such as increasing the amount of loose fill material required in use zones from six to nine inches depending upon the height of the play equipment, and updating slide use zones. This subchapter includes new divisions for soft contained play equipment and inflatables. For the new requirements regarding the maximum height of a play surface and loose fill needed, grandfather clauses are included which gives the center five years to comply. Also, for centers that are located in schools, the center does not have to comply with the equipment rules. However, the center must notify parents that the play equipment does not meet Licensing standards, or the children are not permitted to use the equipment.

Subchapter W, Fire Safety and Emergency Practices, is updated to include a new division for emergency preparedness. Rules include defining the type of situation that constitutes an emergency; what must be included in the plan; who the plan must be shared with; and who is responsible for implementing the plan. This subchapter also requires drills related to severe weather to be conducted every three months instead of every six months. The rules also clarify that centers located in schools are not required to have a fire inspection or an additional fire extinguishing system.

Subchapter X, Transportation, updates transportation requirements. The rules define general purpose vehicle, small school bus, and large school bus and outline which safety restraint systems must be used when transporting children.

The sections will function by reducing the risk to children and improving the quality of care due to updating standards based on current knowledge and practices.

During the public comment period, DFPS received comments from Texas Association for Infant Mental Health (TAIMH), Texas Licensed Child Care Association (TLCCA), Texas Association for the Education of Young Children (TAEYC), United Way of Greater Houston, United Way of Capital Area, League of Women Voters of Texas, Collaborative For Children, Texas Early Childhood Education Coalition (TECEC), Texas Council for Developmental Disabilities, One Voice, Voices, Educational First Steps, Austin/Travis County Health and Human Services Department Early Childhood Council, Knowledge Learning Corporation, a representative from a bus sales and manufacturing company, who submitted comments on behalf of the company and approximately 480 child-care centers, and 702 individuals. A summary of the comments and DFPS's responses follows:

Comment concerning §746.105: One commenter requested that DFPS revise the definition of "After-school program" in paragraph (5) by removing the words "summer vacation" from the definition.

Response: DFPS is adopting this definition without change. The proposed rule deletes the definition of "after-school program," because with the adoption of Chapter 744, Minimum Standards for School-Age and Before or After-School Programs, which was effective September 1, 2010, this definition is no longer applicable or necessary.

Comments concerning §746.201:

(1) One commenter expressed concern about paragraph (5). The commenter was concerned that background checks are not confidential. The commenter said that the agency regularly sends letters addressed to the director of the centers instead of the designee. Sometimes the letters are forwarded to the designee and sometimes they are not.

Response: DFPS is adopting this paragraph without change. In many situations background check information is appropriately released to a center. The intent of this rule is to clarify that all information related to background checks must be kept confidential by the center after the release of the information to the center. Licensing only sends the center notification letters to the designee if he has elected to receive routine correspondence as indicated on the governing body designation form. Otherwise, notifications are sent to the director of the center.

(2) One commenter expressed concern about paragraph (6), regarding the requirement to ensure that parents have the opportunity to visit the center at any time during hours of operation. The commenter stated that some programs held in public schools require parents to scan their driver's license or ID cards in order to enter the school to pick up their children.

Response: DFPS is adopting this paragraph without change. The intent of this paragraph is to ensure that families are able to visit all parts of the center during operating hours without prior approval. Centers can require parents to register once they arrive at the center, as long as pre-approval requirements are not necessary.

Comments concerning §746.301: DFPS received five comments concerning paragraph (8), which requires operations to notify Licensing of any planned closure of five or more consecutive days during their designated hours of operation. Two commenters expressed concern that this rule is unnecessary since they regularly close on school holidays including winter and spring break. One of them suggested that operations be able to send Licensing their annual calendar before school begins. Three commenters asked if they must submit planned closures each year if they do not change.

Response: DFPS is adopting this section without change. A center's designated hours of operation are established by the center itself and are submitted to Licensing either at the time of application or when there is a change in the designated hours of operation. This rule requires facilities to notify Licensing of any planned closures that occur outside their designated hours of operation. For example, a center that chooses to remain closed during specific times of the year, such as local holiday school breaks, would report these scheduled closures in their designated hours of operation to their Licensing inspector at the beginning of the school year. This rule requires reporting unexpected but planned closures, such as those due to reduced enrollment, that were not included in the designated hours of operation.

Comments concerning §746.405: DFPS received three comments in response to subsection (c). Two commenters supported the use of cellular phone service as long as calls to 911 direct emergency personnel to the operation. One commenter expressed concern that this change is unnecessary since cellular phones rely on verbal communication to establish location.

Response: DFPS is withdrawing the proposed changes to add subsection (c) since there is not yet a reliable system available in all areas and among cellular phone providers that ensure a call

made to 911 from a cell phone will automatically direct emergency personnel to the center.

Comments concerning §746.501: DFPS received eight comments concerning paragraph (24). Four commenters supported providing a comfortable place for a mother to breastfeed her child. Four commenters had concerns. Three commenters expressed concerns regarding providing a place for breastfeeding. Two specifically commented regarding the requirement for adult size chairs for breastfeeding and suggested that this only be required if the center had a mother who breast fed. The fourth commenter expressed concern that breastfeeding is a natural human function that is assumed to be provided for and accepted as well as encouraged and not an event that needs to be legislated. One commenter asked for clarification regarding ages and half day programs.

Response: DFPS is adopting this section without change. The intent of the rule is to ensure that mothers have space in the child-care center to breast feed. Breastfeeding protects infants from many diseases and may reduce the risk of childhood obesity. Providing a comfortable place for mothers to feed their children helps to support breastfeeding, which is encouraged by the American Academy of Pediatrics, the Child and Adult Care Food Program administered by the United States Department of Agriculture (USDA), and the U.S. Department of Health and Human Services as outlined in the *Surgeon General's Vision for a Healthy and Fit Nation 2010.* The comfortable place may be in the classroom; no additional chairs are necessary if there are already other adult-size chairs available in the space. This applies to both full and part day programs where children may be in care.

Comment concerning §746.605: One commenter expressed concern regarding who may be listed as an emergency contact. The commenter suggested that the custodial parent should be able to list the other set of parents as the emergency contact person. The commenter stated that this does not make sense and parents get upset when asked to write in someone else since they prefer to list the other parent and step-parent.

Response: DFPS is adopting this section without change. The term "parent" is defined in §745.21(28) of this title (relating to What do the following words and terms mean when used in this chapter?). This definition is applicable to all Licensing chapters unless otherwise specified. Paragraph (6) of this rule does not prevent a parent from designating the non-custodial parent or whomever they choose to be an emergency contact.

Comments concerning §746.631: Two comments were received regarding systems to sign children in and out of care. One commenter expressed support and suggested that this will save staff time since they will not have to go back through paperwork to determine if a child was in care on a previous day. One commenter asked for clarification for half day programs that have regular class hours when referring to a check-in/out system for children. Can accommodations be made for a regular schedule?

Response: This requirement applies to both full and part day programs. It is important that the arrival and departure of each child is recognized and recorded in order to ensure that children are supervised and accounted for and in the event of an emergency at the center. DFPS is adopting this section without change.

Comment concerning §746.801: One commenter asked for clarification regarding what is considered proof of request for a DFPS background check. Is the e-mail received from CLASSPROJECT going to be considered proof?

Response: The e-mail confirmation is considered proof of request. This may be maintained electronically or by paper as long as it is available for review by Licensing. DFPS is adopting this section without change.

Comment concerning §746.805: DFPS received one comment supporting the rule regarding electronic records.

Response: DFPS is adopting this section without change.

Comments concerning §746.901: DFPS received two comments supporting the requirement that a center keep photo identification on record for all personnel.

Response: DFPS is adopting this section without change.

Comments concerning §746.1011: DFPS received 264 comments regarding a director's presence at the center. Of the 20 comments commenting on the entire rule, three supported one director per center, 13 expressed concerns primarily regarding time off for vacation, sick leave, and training, and four requested clarification regarding time off.

Regarding subsection (a), which outlines that a director must be present 75% of the weekly operating hours or 30 hours, DFPS received 192 comments. Eighty-nine commenters supported the requirement. Of the 65 commenters who expressed concern with the proposed rule, the majority stated that this requirement would make it difficult for directors to take time off or be away from the center during operating hours. Some commenters expressed concern that costs would increase since a second director would have to be employed. Forty commenters asked for clarification regarding time off.

Regarding subsection (b), which requires that a director may only be designated for one center, 11 commenters supported the requirement and 39 expressed concern. Three of these commenters suggested that a director may direct more than one center if the overall capacity is less and the centers have good compliance history. Four commenters suggested that there be a grandfather clause or additional time to comply. Seven commenters expressed concern that centers with only one or two classrooms per location will have increased costs or possibly shut down.

Response: The accessibility of a director is fundamental to a well-run operation. The confidence of the parents and the support, guidance, and professional growth of the employees depends largely on the knowledge, skills, and dependable presence of a director. Directors may take time off and designate someone to be in charge during their absence as is currently outlined in §746.1013. In response to the public comments received in opposition to the proposed changes and concerns expressed regarding the potential fiscal impact, DFPS is adopting this section with changes that clarify the intent of the current requirement that a director be routinely present to adequately meet the responsibilities of the position and ensure compliance with all minimum standards; and deleting subsection (b) to further clarify this requirement.

Comments concerning §746.1023: Two commenters expressed support for the addition of experience teaching pre-kindergarten as substitutable experience towards director qualifications.

Response: DFPS is adopting this section without change.

Comment concerning §746.1103: One comment was received for this rule that outlines the differences in qualifications for employees and caregivers. The commenter suggested adding the

term fingerprinting under the heading "Caregivers counted in the child/caregivers ratio."

Response: DFPS is adopting this section without change. The phrase "background checks" is consistent with the term in Chapter 745, Licensing, Subchapter F, which outlines the requirements for all types of background checks including name-based checks, fingerprint-based checks, and central registry checks, depending upon the circumstances.

Comment concerning §746.1107: One commenter expressed concern that allowing an individual with a high school certificate of coursework completion to qualify as a caregiver would create a loophole and reduce the education requirements for caregivers.

Response: DFPS is adopting this section without change. The intent of this change is to clarify that an individual who can provide documentation that they have completed and passed all courses required for high school graduation meets minimum qualifications.

Comments concerning §746.1201: Two comments were received for this rule that outlines general responsibilities of employees. One commenter expressed support for the revision of the requirement that children are not abused, neglected, or exploited while in care. One commenter expressed concerns that the statement "children are not abused, neglected, or exploited while in care" opens all centers up to lawsuits.

Response: DFPS is adopting this section without change. The intent of this rule is to clarify that employees are responsible for ensuring children are not abused, neglected, or exploited while they are in care at the center.

Comments concerning §746.1203: Of the 29 comments received, 18 supported the disallowance of electronic devices for personal use. Seven commenters expressed concern that it should be up to each center to develop a policy on electronic devices that works for them instead of adding a rule. Five commenters asked for clarification regarding the use of cell phone for center business or in the event of an emergency.

Response: DFPS is adopting this section without change. The purpose of the requirement is to prohibit personal use of electronic devices that would interfere with a caregiver being able to appropriately supervise the children in her care. Use of a caregiver's personal cell phone for a business related reason, including contacting the parent or EMS in the event of an emergency, is permissible.

Comments concerning §746.1309: DFPS received seven comments regarding caregiver training. Five commenters supported the addition of training topics. Two commenters expressed concern and one suggested that annual training of child abuse and family violence awareness be required for all caregivers and employees and this training could easily cover SIDS/shaken baby plus much more. The second commenter also expressed concern regarding the cost of training for staff.

Response: DFPS is adopting this section without change. No changes are proposed to the number of hours of training that caregivers and directors must obtain. The only changes are to add and expand the topics that count towards annual training requirements. DFPS provides centers the greatest flexibility to choose who may provide training as outlined in §746.1317 of this title.

Comment concerning §746.1311: One commenter asked if the proposed change in language from "qualified" director to "designated" director would mean that the designated individual would have to meet director qualifications.

Response: DFPS is adopting this section without change. The intent is to clarify language and does not change the meaning from the current rule, which does apply to directors who meet director qualifications as required by §746.1015 or §746.1017 of this title.

Comments concerning §746.1317: Two commenters supported adding language to reference the Texas Trainer Registry and specify that the director or caregiver have specialized training or knowledge on the subject matter they are providing training for.

Response: DFPS is adopting this section without change.

Comments concerning §746.1403: Six commenters were concerned with the proposed rule regarding volunteers and contractors. Two commenters suggested that parents who volunteer not be required to comply with this rule. Three commenters suggested that parents who volunteer should not have to obtain annual training. One commenter expressed concern in how to comply when a contractor sends a substitute without first notifying the center.

Response: DFPS is adopting this section without change. The purpose for changing the rule is to include any person under contract with the center. Volunteers were already required to comply with this rule. Requiring volunteers and contractors to meet employee and caregiver qualifications helps reduce the risk to children in care. Licensing will continue to provide technical assistance and continue to clarify which volunteers and parents who supplement the ratios for activities such as swimming and field trips on an incremental or irregular basis do not require training.

Comments concerning §746.1601: DFPS received 369 comments concerning child to caregiver ratio. Of the commenters, 182 supported the changes. Supporters stated that Texas ratios lag behind the majority of the nation and several commented that they support even lower ratios based on the recommendations of American Academy of Pediatrics (AAP).

One hundred and eighty-one commenters were concerned with the changes. The majority of commenters were concerned that reducing ratios would increase the cost of child care for both providers and parents. Many others commented that centers would offer fewer slots for children whose families receive child care subsidies to make up the cost of lowered ratios. Some commenters expressed the concern that fewer slots would result in more families seeking unregulated care. Commenters expressing concern also stated that reimbursement rates for child care subsidies have not kept pace with the actual cost of care over the last few years. Six commenters expressed general comments that while the changes in ratios benefit children, the cost to decrease ratios must be considered.

Response: DFPS is withdrawing the proposed changes to this rule. DFPS proposed changes to this section based on current research and feedback from stakeholders and appreciates the support expressed by commenters during the comment period. Comments were also received from stakeholders, including child-care providers and parents, who expressed concern with lowering the ratios at this time. Many of these commenters indicated that although they believe lower ratios are beneficial, it

would adversely and disproportionately affect the families who need child care right now.

In response to the concerns expressed about the fiscal impact during a tough economic period for both child-care businesses and working parents, as well as the risk to any children placed in unregulated care as a result of potential increases to child-care costs, DFPS is withdrawing the proposal.

Comments concerning §746.1609: DFPS received 141 comments concerning the maximum group size requirements for children in care. Of those, 72 commenters supported the changes. Commenters expressed that reducing group size supports a safer environment and promotes higher quality care and learning. Other commenters expressed that large group sizes can adversely affect children's behavior, while others mentioned that large groups may lead to increased caregiver stress and burnout.

Sixty-six commenters expressed concern regarding the changes, primarily regarding the increased costs that will result. Commenters also were concerned that there would be less availability of infant and toddler care and families may be encouraged to seek unregulated care. Four commenters suggested keeping the current group size for infants and toddlers but allow three caregivers.

Three commenters asked for clarification on the changes.

Response: DFPS proposed changes to this section based on current research and feedback from stakeholders and appreciates the support expressed by commenters during the comment period. Comments were also received from stakeholders, including child-care providers and parents, who expressed concern with lowering the ratios at this time. Many of these commenters indicated that although they believe lower ratios are beneficial, it would adversely and disproportionately affect the families who need child care right now.

In response to concerns about the fiscal impact for both child-care businesses and working parents as well as the risk to any children placed in unregulated care as a result of potential increases to child-care costs, DFPS is withdrawing the proposed changes to this section.

Comment concerning §746.1617: DFPS received one comment suggesting clarifying the language to state that a center must maintain at least the following classroom ratios until the center meets the new ratios, no later than December 1, 2012.

Response: DFPS is withdrawing new §746.1617. DFPS proposed changes to this section based on current research and feedback from stakeholders and appreciates the support expressed by commenters during the comment period. Comments were also received from stakeholders, including child-care providers and parents, who expressed concern with lowering the ratios at this time. Many of these commenters indicated that although they believe lower ratios are beneficial, it would adversely and disproportionately affect the families who need child care right now.

In response to the concerns expressed about the fiscal impact during a tough economic period for both child-care businesses and working parents, as well as the risk to any children placed in unregulated care as a result of potential increases to child-care costs, DFPS is withdrawing the proposal.

Comment concerning §746.2101: One commenter expressed concern that when children are playing on their regular playground and playing in a sprinkler the caregivers should be able to watch them just like they do when the sprinklers are not in use.

Response: No additional caregivers are required for sprinkler play as outlined in §746.2117 of this title. In response to the concerns expressed about the fiscal impact during a tough economic period for both child-care businesses and working parents, as well as the risk to any children placed in unregulated care as a result of potential increases to child-care costs, DFPS is withdrawing the proposal of this amendment.

Comment concerning §746.2201. Two commenters supported the requirement to ensure that the needs of all children, including those with special care needs, are met.

Response: DFPS is adopting this section without change.

Comments concerning §746.2205: DFPS received 75 comments regarding what an activity plan must include. Sixty-nine commenters supported the requirement that children have the opportunity to play outdoors in both the morning and afternoon. Four commenters expressed concern that it is not possible to go outdoors twice a day every single day. One commenter suggested changing the requirement to one hour a day in the morning and/or afternoon. One commenter asked for clarification for part day centers. One commenter suggested that DFPS add specifics about temperature and ozone alert days for outdoor time.

Response: DFPS is adopting this section without change. Giving children multiple opportunities to play outside ensures children engage in 60 to 90 minutes of outdoor play daily. Increasing the amount of time spent in active play is supported by the American Academy of Pediatrics and the U.S. Department of Health and Human Services, as outlined in the *Surgeon General's Vision for a Healthy and Fit Nation 2010.* The flexibility to consider appropriate weather conditions when planning outdoor play is currently provided in the requirements regarding activities for each age group in §§746.2417, 746.2507, 746.2607, and 746.2707 of this title. It is reasonable that a part day center operating less than five consecutive hours may only offer a single outdoor play opportunity. Licensing will continue to offer technical assistance in order to assist providers in addressing variable weather conditions.

Comments concerning §746.2207: DFPS received 106 comments, 81 who supported the addition of age and time limits for screen time activities. Twenty-four commenters had concerns. Most of these commenters were concerned that they will no longer be able to use educational materials that support learning for children younger than two years. Two commenters were concerned that the language suggests that screen time may be considered an activity and that more centers may choose to fill two hours of the day this way. Two commenters suggested that the time limit be changed to one hour maximum or be allowed in 30 minute increments. One commenter asked if television viewing will still be allowed the first and last 45 minutes of the day when children are arriving and departing.

Response: DFPS is adopting this section without change. The prohibition of screen time activities for children younger than two years of age is supported by the American Academy of Pediatrics. In addition, the American Academy of Pediatrics recommends limits on screen time for children older than two years to be no more than one to two hours per 24-hour period. When planning activities for children, it is important to consider if children could learn a skill better through hands-on experiences.

Television viewing during the first and last 45 minutes of the day will be allowable within the two-hour limit per 24-hour period.

Comments concerning §746.2505: DFPS received eight comments regarding training cups used by toddlers. Four commenters supported requiring a child's first name and initial of last name on training cups. One commenter expressed concerns and suggested that each child have their own color of cup instead since a child this age cannot read her name, but may recognize the color of her cup. Three commenters asked for clarification. Two asked if training cups that are cleaned and sanitized between each use must be labeled. One commenter asked if this also applies to regular cups used by toddlers.

Response: The intent of this rule is to ensure that training cups used by children are maintained in a sanitary manner. The use of different colors for each child meets the intent and will be allowed as long as there is a way to verify which cup color is associated with each child, such as a color-code chart.

DFPS is adopting this section with changes to paragraph (4) to clarify that (a) if names are not used, then there is a system in place so training cups are individually assigned to each child; or (b) training cups are cleaned and sanitized between each use.

Comments concerning §746.2507: Two commenters supported allowing toddlers the opportunity to play outdoors in the morning and afternoon. Two commenters were concerned that this rule does not give caregivers the flexibility to decide when to go outdoors.

Response: DFPS is adopting this section without change. Giving children multiple opportunities to play outside ensures children engage in 60 to 90 minutes of outdoor play daily. Increasing the amount of time spent in active play is supported by the American Academy of Pediatrics and the U.S. Department of Health and Human Services, as outlined in the *Surgeon General's Vision for a Healthy and Fit Nation 2010.* Providers have the flexibility to determine what is considered appropriate weather. It is reasonable that a part day center operating less than five consecutive hours may only offer a single outdoor play opportunity. Licensing will continue to offer technical assistance in order to assist providers in addressing variable weather conditions.

Comment concerning §746.2509: One commenter expressed the concern that parents of toddlers appreciate receiving a daily report and that they are a great way to keep open communication between parents and teachers.

Response: DFPS is adopting this section without change. The rule gives providers the greatest level of flexibility regarding the sharing of information about a child's day while in care.

Comments concerning §746.2607: Two commenters supported allowing children the opportunity to play outdoors in the morning and afternoon. One commenter expressed the concern that with the increasing level of expectations for pre-k children to obtain the skills they obtain before entering kindergarten, the rule would take away from instruction time.

Response: DFPS is adopting this section without change. Many of the skills that are outlined in the revised Texas pre-kindergarten guidelines from the Texas Education Agency (TEA) may be taught in a variety of settings that includes outdoors. Outdoor play can be utilized to support learning in areas such as social and emotional development, language and communication, and science.

Comments concerning §746.2707: Two commenters supported allowing school-age children the opportunity to play outdoors in the morning and afternoon.

Response: DFPS is adopting this section without change. Giving children multiple opportunities to play outside ensures children engage in 60 to 90 minutes of outdoor play daily. Increasing the amount of time spent in active play is supported by the American Academy of Pediatrics and the U.S. Department of Health and Human Services, as outlined in the *Surgeon General's Vision for a Healthy and Fit Nation 2010.* Providers have the flexibility to determine what is considered appropriate weather. It is reasonable that a part day center operating less than five consecutive hours may only offer a single outdoor play opportunity. Licensing will continue to offer technical assistance in order to assist providers in addressing variable weather conditions.

Comment concerning §746.2909: One commenter supported the clarification of language in this rule that outlines the arrangement of napping equipment. This language is more consistent with NAEYC accreditation standards.

Response: DFPS is adopting this section without change.

Comments concerning §746.3103 and §746.3107: One commenter was concerned when children may be included in a get-well care program. The commenter suggested that the rule be amended to no longer reference the excludable diseases as defined by the Department of State Health Services (DSHS) since excluding children who have an excludable disease are the same children who would be served by a get-well program.

Response: DFPS is adopting these sections without change. The intent of this change is to update the state agency reference. Get-well care is designed for children who are too ill to attend their regular care program but do not have an excludable disease. Children who are no longer contagious but have a greater need for care, or do not feel well enough to participate comfortably in the classroom activities may benefit from attending a get-well program.

Comments concerning §746.3301: DFPS received 170 comments concerning the basic requirements for snack and mealtimes. Forty-six commenters supported the rule, while 12 commenters had concerns, and five commenters had general comments.

Five commenters specifically supported subsection (b), which requires water to be made available and served at each meal and snack time. Seventeen commenters had specific concerns with this subsection. Seven commenters were concerned that serving water would mean that a second cup would be required and increase costs. Four commenters were concerned that serving water along with milk would decrease milk consumption overall. Other commenters felt that it should be left up to the parent to decide. Five commenters asked if having a water fountain meets the requirement to serve water.

Thirty-four commenters supported subsection (c), which prohibits beverages with added sugars from being served to children in care. Thirty-eight commenters expressed specific concerns for this same subsection. Fifteen commenters said that it is the parent's choice what to send to drink. Sixteen commenters were concerned that fruit punch and sweetened milk would no longer be allowed to be served for birthdays or other special occasions. Eleven commenters were concerned that children would drink less milk if flavored milk is no longer allowed. Two commenters suggested allowing flavored milk

while excluding other beverages with added sugars. Eight commenters asked for clarification if beverages with added sugars may be served to children on special occasions.

Response: DFPS is adopting subsection (b) without changes. The purpose of subsection (b) is for children to be served water during meals and at snack time. Although this requirement may be met in a variety of ways, providing access to a water fountain alone does not meet the purpose of the rule. Research indicates serving drinking water to children ensures they are properly hydrated and facilitates reducing the intake of extra calories from nutrient poor foods and drinks which are associated with weight gain and obesity. Consumption of more water is supported by the U.S. Department of Health and Human Services as outlined in the *Surgeon General's Vision for a Healthy and Fit Nation 2010.*

Water may be served in the same cup as milk or juice. It is reasonable to serve or ask the children to serve themselves the milk or juice that is being offered as a part of the meal or snack before serving the water.

Liquids with added sugars provide less nutritional value overall and should be avoided as they also promote tooth decay. This is supported by the American Academy of Pediatrics. The U.S. Department of Health and Human Services, as outlined in the *Surgeon General's Vision for a Healthy and Fit Nation 2010,* also supports reducing consumption of sodas and juices with added sugars.

DFPS is not revising §746.3309, which outlines the requirements for meals and snacks provided by parents so parents will continue to be able to provide meals and snacks.

DFPS is adopting subsection (c) with changes to clarify that beverages with added sugars may be served for special occasions such as holidays or birthday celebrations.

Comments concerning §746.3305. DFPS received 30 comments on this rule, which outlines a child's daily food needs. Twenty-seven commenters supported that the rule reflects the requirements of the state obesity prevention program. Three commenters were concerned that parents will no longer have the option to provide other foods.

Response: DFPS is adopting this section without change. The purpose of the amendment to the rule for daily food needs is to regroup the age ranges and portion sizes to be more consistent with the Child and Adult Care Food Program administered by the U.S. Department of Agriculture (USDA). DFPS is not revising §746.3309, which outlines the requirements for meals and snacks provided by parents so parents will continue to be able to provide meals and snacks.

Comments concerning §746.3316: DFPS received 31 comments concerning what fruit and vegetable juices may be served to children in care. Thirty commenters supported the types and amounts of juice that may be served. These commenters stated that this reflects the requirements of the state obesity prevention program. One commenter was concerned with requiring a center to replace juices with water since some children do not drink water.

Response: DFPS is adopting this section without change. The limits on the amount and types of juice served to children in care are supported by the American Academy of Pediatrics and the Child and Adult Care Food Program administered by the USDA.

Comment concerning §746.3409: One commenter was concerned about lowering the length of time that disinfectant solution must be left on the surface of any item that is being sanitized. The commenter suggested keeping the current requirement in order to be more sanitary even if that means soaking something for a longer period of time to ensure cleanliness.

Response: DFPS is adopting this section without change. The American Academy of Pediatrics supports leaving a sanitizing solution on the surface for a minimum of two minutes before wiping dry.

Comments concerning §746.3411: DFPS received four comments concerning what is considered a disinfecting solution. Two commenters supported the clarification of commercial products that may be used as disinfectant solutions. Two commenters expressed concerns. One commenter suggested that bleach be used less frequently since it is toxic. The second commenter suggested adding language to support the use of more natural disinfectants.

Response: DFPS is adopting this section without change. The intent of this rule is to clarify what commercial products may be acceptable to use as disinfectant solutions based on Environmental Protection Agency (EPA) guidelines. The American Academy of Pediatrics supports the use of bleach as a sanitizing agent. Licensing will continue to research the efficacy and safety regarding the use of other alternative disinfectants.

Comments concerning §746.3503: DFPS received 14 comments regarding diaper changing equipment. Five commenters supported the rule. Eight commenters expressed concern with the rule. Five of these commenters suggested that the diapering surface have a safety mechanism that is used when a child is on the surface and the caregiver's hand must remain on the child at all times. Three commenters expressed concern that a caregiver's hand on the child does not adequately protect a child from falling. Two commenters suggested allowing a mat on the floor to be used as a diaper-changing surface.

Response: DFPS is adopting this section without change. The intent of this rule is to clarify examples of safety mechanisms that may be used when changing a child's diaper above floor level, including safety straps, raised sides, or a caregiver's hand that remains on the child at all times. The rule is consistent with current recommendations from the American Academy of Pediatrics. The current requirement allows a mat placed on the floor to be used as a diaper-changing surface.

Comments concerning §746.3601: DFPS received two comments concerning what type of illnesses prohibit a child's admission into care. One commenter supported the changes regarding fevers since this change is recommended by American Academy of Pediatrics (AAP), more reasonable for parents, and much more of an indicator that a child is really ill and should be excluded. One commenter expressed concern that increasing the allowable temperature would allow the child to remain in care and spread germs/illness for a longer period of time.

Response: DFPS is adopting this section without change. The intent of the change in language is to be consistent with current recommendations from the AAP.

Comments concerning §746.4215: DFPS received two comments regarding the sharing of indoor activity space while children are in care. One commenter supported the changes since they meet the needs of centers located on public school campuses that may share indoor activity space. The second commenter was concerned that the rule will lead to confusion and access of people with unknown backgrounds into the cen-

ters. Centers should be safe and closed off from other business or activities.

Response: DFPS is adopting this section without change. The intent of the rule is to allow for shared use of indoor space, excluding classroom space, as long as the center is following a written plan that specifies how caregivers will supervise and account for children in their care. Implementing and following the written plan reduces the overall risk for children in care.

Comments concerning §746.4315: DFPS received two comments. One commenter supported the changes to allow other programs to share outdoor activity space. The second commenter was concerned that the rule does not address outdoor space capacity and asked how Licensing will assess for compliance.

Response: DFPS is adopting this section without change. The intent of the rule is to allow for shared use of outdoor space as long as the center is following a written plan that specifies how caregivers will supervise and account for children in their care. Implementing and following the written plan reduces the overall risk for children in care. Licensing staff will determine compliance by observation and review of documentation during inspections.

Comment concerning §746.4509: DFPS received one comment supporting the clarification regarding lofts.

Response: DFPS is adopting this section without change.

Comments concerning §746.4601: DFPS received two comments regarding the safety requirements of active play equipment. One commenter was concerned that the same safety requirements for active play equipment apply to equipment away from the center. The second commenter was concerned with paragraph (10), which outlines stairs and steps on climbing equipment, regardless of height, must have handrails the children can reach. Some climbing equipment for toddlers is designed to be crawled on as well as walked on. It is specifically designed so that toddlers can be independent and play freely and requiring hand rails would negate the child's freedom and take away from the experience the equipment is designed to provide.

Response: DFPS is adopting this section without change. The requirement that equipment used both at and away from the center meets the same safety requirements is to reduce the risk of injury to children in care. Handrails on stairways and step ladders are intended to provide hand support and to steady the user when accessing stationary climbing equipment. Licensing will offer technical assistance and can address questions regarding individual types and designs of equipment.

Comment concerning §746.4605: One commenter suggested adding an example or definition to clarify what fulcrum seesaws and track rides are.

Response: DFPS is adopting this section without change. Licensing will offer technical assistance and can address questions regarding individual types and designs of equipment, including sharing photos or descriptions of equipment as needed.

Comment concerning §746.4607: One commenter was concerned and suggested that this rule regarding the maximum height of play surfaces is not necessary.

Response: DFPS is adopting this section without change. Limiting the maximum height of equipment reduces the risk of severe injuries to children.

Comment concerning §746.4805: One commenter supported the revisions regarding use zones for slides.

Response: DFPS is adopting this section without change.

Comments concerning §746.4907: DFPS received 39 comments concerning the installation of loose-fill surfacing material under outdoor active play equipment. Three commenters supported increasing the amount of loose-fill surfacing material from six to nine inches. One commenter stated that falls on climbing equipment are common injuries on playgrounds and can be very dangerous injuries for children. Thirty-six commenters expressed concern with the increase. Eighteen of these commenters said it would be expensive to add three inches of material. Seven commenters stated that the height of barriers to keep the loose-fill material in place may be unsafe for younger children to climb over. Three commenters suggested that supervision by the caregivers prevents more playground injuries rather than increasing the loose-fill surfacing material.

Response: Since falls are a very common playground hazard, the installation and maintenance of protective surfacing under and around all equipment is crucial to protect children from severe head injuries. The changes are consistent with guidelines for playgrounds in the Consumer Product Safety Commission Public Playground Safety Handbook and eliminate the previous chart which was confusing and difficult to interpret. Centers will have five years to budget, plan and add loose-fill surfacing materials and modify barriers to hold the surfacing materials as a part of their regular maintenance of loose-fill materials.

Based on commenters' concerns regarding costs associated with the changes, DFPS is adopting this section with changes to subsections (a) and (b) to require at least six inches of loose-fill materials be used when equipment is five feet or less in height and at least nine inches of loose-fill materials be used when equipment is greater than five feet in height.

Comment concerning §746.4951: One commenter suggested that an example of soft contained play equipment be included in the rule.

Response: DFPS is adopting this section without change. Licensing will offer technical assistance and can address questions regarding individual types and designs of equipment, including sharing photos or descriptions of equipment as needed.

Comments concerning §746.5202: DFPS received 10 comments, nine in support of the rule. One commenter expressed concerns for centers that are part of a public school district that may have different requirements.

Response: DFPS is adopting this section without change. The intent of this rule is to ensure centers have thought about and designed a plan that reduces risk to children in care in the event of an emergency. The rule is based on recommendations from National Association of Child Care Resource and Referral Agencies (NACCRRA) disaster policy recommendations.

For those centers operated by a public school district or located in a public school, the emergency preparedness plan must include what is outlined in this rule and may also include additional requirements as required by the school district.

Comments concerning §746.5205: DFPS received 10 comments concerning paragraph (2). Two commenters supported the requirement to conduct severe weather drills every three months. Eight commenters expressed concern and suggested

that the current rule requiring centers to conduct the drills every six months is adequate.

Response: DFPS is adopting this section without change. The changes to this rule are consistent with recommendations from the American Academy of Pediatrics. More frequent severe weather drills ensure that newly enrolled children and staff have the opportunity to practice and become more familiar with evacuation procedures.

Comments concerning §746.5607: DFPS received eight comments. Three commenters expressed support for the changes in what types of child safety restraint systems must be used when transporting a child in care.

Five commenters expressed concern with the rule. Two of these commenters expressed concern regarding the cost to comply. One commenter suggested that child booster seat laws need to be removed since they make it difficult to take children on field trips. Two commenters suggested that a booster seat or safety seat not be required for a child who is at least four years of age and weighs less than 40 pounds when riding in small buses. This second of these two comments was received on behalf of a bus sales and manufacturing company representing approximately 480 child-care centers. This commenter stated that NHTSA has concluded that 3-point seat belts of a type that will become mandatory on small school buses October 20, 2011, are considered to be a child safety restraint system appropriate for any four year old child regardless of weight or height. The commenters make the suggestion that subsection (d)(4) be amended to add a separate category for small school buses that adds that a child may be restrained in a properly-fitting 3-point safety belt anywhere the child sits in the vehicle. This same commenter requested that an error referencing Senate Bill 61 in the preamble be corrected.

Response: DFPS is adopting this section without change. This rule was previously proposed and withdrawn based on the numerous comments that were received. DFPS worked closely with stakeholders in an effort to propose a rule that reflects the greatest protections to children being transported by child-care programs - in particular, those children being transported in large and small buses.

Stakeholders have expressed that the compromises reached as a result of meeting and an ongoing exchange of information were satisfactory with the exception of safety requirements for children who are four years of age weighing 40 pounds or less.

While stakeholders contend that children who are four years of age regardless of height and weight, being transported on a small bus (with a gross vehicle weight rating of 10,000 pounds or less) are equally safe in a child safety restraint or three point safety belt, this is not supported by the American Academy of Pediatrics or the National Highway Traffic Safety Administration (NHTSA).

Our research consistently found that a child who is less than 40 pounds, less than four years old, or less than 40 inches tall, should be in the appropriate child safety seat, safety vest or bus-specific add-on restraint system (such as the STAR system). Although the NHTSA addition of lap shoulder belts to small buses in October 2011 will further the protection of children being transported in this type of vehicle, the law is not retroactive. Small buses with safety belts that do not fit children properly will continue to pose a safety risk to four year olds who weigh 40 pounds or less.

DFPS is not making any changes to the rule at this time. However, Licensing will provide technical assistance as needed and will consider waiver or variance requests submitted by individual operations using small buses that meet the NHTSA requirements.

Although the passage of S.B. 61 by the 80th Texas Legislature prompted the research that led to the content of the proposed rule, the requirements in their entirety are not required by the new law, as stated in the preamble.

General comments for Chapter 746: DFPS received 97 general comments. Seventy-eight comments were received regarding all of the rules, 70 in support for all the rules.

(1) Seven commenters were opposed to all the rules. Three commenters expressed concern regarding the costs that may be incurred as a result of the rules. One commenter made a general comment that the rules are neutral but look fair.

Response: DFPS is sensitive to the challenges that child-care operations and families are faced with given our current economy. However, experience indicates that children are safer in regulated care settings with caregivers that have a baseline of training in child growth and development, health, and safety. Minimum standards establish this baseline and help achieve a balance between the benefits derived from regulation and the affordability and availability of healthy and safe child-care.

(2) Four commenters suggested phasing in a continuity of care model allowing children to stay with one primary caregiver for several years instead of transitioning to a new class every year.

Response: Current rules allow for a continuity of care model. Centers that desire to use a continuity of care model that includes infants may request a variance for §746.1605 that would outline their plan for combining infants with children 18 months and older.

(3) One commenter expressed concern that there were no regional meetings scheduled in the Rio Grande Valley, even though there are 600 to 1000 or more child-care centers in this area.

Response: A total of 41 regional stakeholder meetings were held in 18 cities across the state from September to November 2009. Locations were selected to accommodate the greatest number of providers in each DFPS District and based on the accessibility and availability of space. Meetings were held in Corpus Christi and San Antonio.

(4) One commenter suggested that there be a period of technical assistance of at least six months so that centers may revise policies and notify parents.

Response: As with all new rules, Licensing will offer a period of technical assistance after the rules become effective, to facilitate compliance.

(5) One commenter expressed concern with the format of the minimum standards publication and suggested that rules be stated rather than in a question and answer format, similar to how they were in 1982.

Response: The rules are written in a question and answer format reflecting the use of plain language recommended and used in federal and state law.

(6) One commenter suggested that the rules be incorporated into the entire version of the minimum standards so that providers may be able to easily access them.

Response: Once final rules have been adopted, the minimum standard publications will be updated to include rule changes, add information on best practices and include an expanded index making it easier to find information.

(7) One commenter expressed concern that she and her child who has Down's syndrome and autism has been blacklisted at child-care centers. The commenter suggested that directors need to be trained on discrimination.

Response: If a parent has concern that a program is not following minimum standard rules he may make a report to Licensing. Licensing may also be able to provide consumers with information on local resources, other state agencies, and advocacy organizations that can assist in addressing a family's needs.

(8) Two commenters expressed concern regarding the cost impact analysis survey. One commenter was concerned about the statistics provided. The second commenter was concerned that many centers did not receive the postcard or e-mail notification regarding the survey and when they found out they only had five days left to complete the survey. This commenter suggested that owners or designated directors need to receive all notifications sent by Licensing. The commenter also asked who completed the surveys.

Response: Stakeholders were encouraged throughout the rulemaking process to provide input and feedback during regional stakeholder meetings, cost impact surveys and the public comment period. The cost impact analysis survey was conducted using a web-based survey tool January 16 - 30, 2010. Attendees of the 41 regional stakeholder meetings held during the fall of 2009 were informed that the survey would be web-based and conducted in January 2010. A link to the online survey was e-mailed to 7,345 child-care centers across the state that provided an e-mail address to Licensing. There were 1,614 surveys completed on or before the deadline. A postcard was mailed in mid-April 2010 to all licensed child care centers regarding the proposed rules and the public comment period. In addition, an e-mail was sent on June 10, 2010, to licensed child care centers with e-mail addresses on file with CCL to remind them of the public comment period, which was June 11 - July 12, 2010. The comment period was also extended to include testimony provided at the July 16, 2010, DFPS council meeting.

(9) One commenter suggested that Licensing needs to represent and include all groups (non-profit and for-profit alike) in the rulemaking process.

Response: Of the survey respondents 50.7% identified themselves as for profit providers while 49.3% indicated they are nonprofit.

(10) One commenter was concerned that rules are developed around the ability of staff to regulate and that minimum standards do not equal quality.

Response: Minimum standards establish the baseline for healthy and safe out of home care for children and are based on research and information provided by the CPSC, AAP, NAEYC and Texas state agencies. Licensing offers training and technical assistance to facilitate provider compliance and encourages improving the quality of care available to consumers.

(11) One commenter suggested that FBI checks should be transferable between operations due to the cost of the check.

Response: Licensing is currently working on establishing a way to verify FBI checks for multiple operations under the same governing body.

(12) One commenter was concerned regarding the operation and program director qualifications as outlined in Chapter 744 of this title (relating to Minimum Standards for School-Age and Before or After-School Programs). The commenter suggested that directors who have served as directors for at least a year should be exempt from the new qualification standards unless they change employers.

Response: Licensing evaluates director qualifications on an individual basis; and staff will provide technical assistance and consider waiver or variance requests to provide the greatest flexibility to comply.

(13) One commenter supported evaluating the minimum standards every six years since it will help to strengthen care to children in child-care centers.

Response: DFPS appreciates the comment.

In addition to comments on proposed rules, DFPS received the following comments on rules that were not proposed at this time.

Comment concerning §746.401: DFPS received one comment regarding the posting of required items. The commenter stated that most parents are in such a rush they do not stop to see the postings. The commenter suggested that each class should have a board of what that class did that day or show parents where to find their daily activities posted.

Response: No changes were proposed to this rule; however, DFPS will consider proposing further changes at a later date, so child advocates and parents will have the opportunity to submit public comment on any proposed change to the rule.

Comments concerning §746.1015: DFPS received three comments concerning director qualifications. The commenters were concerned that current director qualification requirements are too high. One commenter suggested that all prospective directors be required to take a skills test either in writing, by demonstration, or both.

Response: No changes were proposed to this rule; however, DFPS will consider proposing further changes at a later date, so DFPS can appropriately research this issue and child advocates and parents will have the opportunity to submit public comment on any proposed change to the rule.

Comments concerning §746.1205: Two commenters expressed concern with the current definition of supervision. One suggested that the term physical presence be added to the rule. The second commenter suggested that school-age children be allowed some freedom to be out of sight and sound of the caregiver to do such things as travel to and from the restroom and transition from one area to another.

Response: No changes were proposed to this rule. The definition for supervision is always difficult and there is never complete agreement on any one definition. The current definition does attempt to encompass issues like physical presence and age appropriate freedom. DFPS is not recommending any changes to the definition of supervision at this time.

Comments concerning §746.1301: DFPS received 31 comments concerning required training. Nineteen commenters support increasing initial and annual training requirements for employees including caregivers and directors. Eleven com-

menters expressed concern regarding the increase of initial and annual training requirements. One commenter expressed concern regarding requiring pre-service training stating that this is not required in order for a parent to have a child.

Response: No changes were proposed to this rule; however, a request has been made to the Office of Attorney General (OAG) regarding DFPS' legal authority to increase training hours by rule. Once DFPS receives a response from the OAG, DFPS will determine whether changes to the training rules are needed.

Comment concerning §746.2415: One comment was concerned that infant bouncer seats will no longer be allowed in infant classrooms.

Response: No changes were proposed to this rule; however, this rule does not prohibit the use of infant bouncer seats in the classroom. Licensing will continue to offer technical assistance in order to assist providers regarding what equipment is and is not allowed. DFPS is not recommending any proposed changes at this time.

Comment concerning §746.3421: One commenter expressed concern that it is it difficult to safely hold an infant up to a sink to wash his hands after diapering.

Response: No changes were proposed to this rule; however, the current rule does note that if an infant is not old enough to be raised to the sink and reach for the water, then the infant's hands should be washed with towels. DFPS is not recommending any proposed changes at this time.

In addition to changes as a result of comments, DFPS is adopting §746.1021 with a change to subsection (a)(3) to add that the experience can come from another country. This change will help clarify that experience in another country counts toward director qualifications and will make the rule consistent with a similar rule in Chapter 744. DFPS is adopting §746.4901 with a change to subsection (b) to delete "type" to describe loose-fill surfacing material required under active play equipment. Other changes made to the rules now base the depth of the loose-fill material on the height of the play equipment, not the "type" of loose-fill material.

Also, DFPS is withdrawing new §746.1803 and §746.2103 as a result of the withdrawal of the other rules concerning child-care ratios.

SUBCHAPTER A. PURPOSE AND DEFINITIONS

40 TAC §746.103, §746.105

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION
DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

40 TAC §746.201

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 2. REQUIRED NOTIFICATION

40 TAC §§746.301, 746.305, 746.307

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

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DIVISION 3. REQUIRED POSTINGS

40 TAC §746.405

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.405. What telephone numbers must I post and where must I post them?

(a) You must post the following telephone numbers:

(1) 911 or, if 911 is not available in your area, you must post the numbers for:

(A) Emergency medical services;

(B) Law enforcement; and

(C) Fire department;

(2) Poison control;

(3) DFPS child abuse hotline;

(4) Nearest Licensing office telephone number and address; and

(5) The child-care center name, address, and telephone number.

(b) You must post the telephone numbers next to each telephone in the child-care center. If the child-care center uses cordless or cellular phones, these same numbers must be posted in a prominent place on the wall near the doorway in each room of the child-care center, or on the phone handset.

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DIVISION 4. OPERATIONAL POLICIES

40 TAC §746.501

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SUBCHAPTER C. RECORD KEEPING

DIVISION 1. RECORDS OF CHILDREN

40 TAC §§746.605, 746.607, 746.613, 746.627, 746.631

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 2. RECORDS OF ACCIDENTS AND INCIDENTS

40 TAC §746.703

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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DIVISION 3. RECORDS THAT MUST BE KEPT ON FILE AT THE CHILD-CARE CENTER

40 TAC §746.801, §746.805

The amendment and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment and new section implement HRC §42.042.

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DIVISION 4. PERSONNEL RECORDS

40 TAC §746.901

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER D. PERSONNEL

DIVISION 1. CHILD-CARE CENTER DIRECTOR

40 TAC §746.1005

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall

adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

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40 TAC §§746.1011, 746.1019, 746.1021, 746.1023, 746.1027, 746.1029

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.1011. Must my director be at my child-care center during all hours of operation?

No; however, your director's presence during operating hours must be routine and adequate enough to meet the position's responsibilities as described in §746.1003 of this title (relating to What are the director's responsibilities while at the child-care center?), including the responsibility to ensure the child-care center complies with all minimum standards.

§746.1021. What constitutes experience in a licensed child-care center, or in a licensed or registered child-care home?

(a) Only the following types of experience may be counted as experience in a licensed child-care center:

(1) Experience as a director, assistant director, or as a caregiver working directly with children, obtained in any DFPS licensed child-care center, whether paid or unpaid;

(2) Experience as a director, assistant director, or caregiver working directly with children, whether paid or unpaid, in a DFPS licensed day-care center, group day-care home, kindergarten or nursery school, schools: grades kindergarten and above, drop-in care center, or in a DFPS alternatively accredited program; and

(3) Experience as a director, assistant director, or caregiver working directly with children in a licensed or certified child-care center in another state or country.

(b) Only the following types of experience may be counted as experience in a licensed or registered child-care home:

(1) Experience as a primary caregiver or assistant caregiver working directly with children, whether paid or unpaid, in a DFPS licensed or registered child-care home;

(2) Experience as a director, assistant director, or caregiver working directly with children, whether paid or unpaid in a DFPS licensed group day-care home; or

(3) Experience as a primary caregiver of a DFPS registered family home.

(c) You must have obtained all work experience in a full-time capacity or its equivalent in a part-time capacity. Full-time is defined as at least 30 hours per week.

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DIVISION 2. CHILD-CARE CENTER EMPLOYEES AND CAREGIVERS

40 TAC §§746.1103, 746.1105, 746.1107

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 3. GENERAL RESPONSIBILITIES FOR CHILD-CARE CENTER PERSONNEL

40 TAC §746.1201, §746.1203

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 4. PROFESSIONAL DEVELOPMENT

40 TAC §§746.1309, 746.1311, 746.1313, 746.1317, 746.1323, 746.1325

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 5. VOLUNTEERS, SUBSTITUTES, AND CONTRACTORS

40 TAC §746.1403

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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SUBCHAPTER E. CHILD/CAREGIVER RATIOS AND GROUP SIZES

DIVISION 2. CLASSROOM RATIOS AND GROUP SIZES FOR CENTERS LICENSED TO CARE FOR 13 OR MORE CHILDREN

40 TAC §746.1617

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall

adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 3. CLASSROOM RATIOS AND GROUP SIZES FOR CENTERS WHEN 12 OR FEWER CHILDREN ARE IN CARE

40 TAC §746.1711

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

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DIVISION 4. RATIOS FOR FIELD TRIPS

40 TAC §746.1803

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

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DIVISION 7. RATIOS FOR WATER ACTIVITIES

40 TAC §746.2107

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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SUBCHAPTER F. DEVELOPMENTAL ACTIVITIES AND ACTIVITY PLAN

40 TAC §§746.2201, 746.2203, 746.2205, 746.2207

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
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SUBCHAPTER G. BASIC CARE REQUIREMENTS FOR CHILDREN WITH SPECIAL CARE NEEDS

40 TAC §746.2301

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. BASIC CARE REQUIREMENTS FOR TODDLERS

40 TAC §§746.2505, 746.2507, 746.2509

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.2505. What furnishings and equipment must I provide for toddlers?

Furnishings and equipment for toddlers must include at least the following:

(1) Age-appropriate seating, tables, and nap or rest equipment;

(2) Enough popular items available so that toddlers are not forced to compete for them;

(3) Containers or low shelving so items children can safely use without direct supervision are accessible to children; and

(4) Training cups, if used, that are:

(A) Labeled with the child's first name and initial of last name or otherwise individually assigned to each child; and/or;

(B) Cleaned and sanitized between each use.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER J. BASIC CARE REQUIREMENTS FOR PRE-KINDERGARTEN AGE CHILDREN

40 TAC §746.2607

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER K. BASIC CARE REQUIREMENTS FOR SCHOOL-AGE CHILDREN

40 TAC §746.2707

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER L. DISCIPLINE AND GUIDANCE

40 TAC §746.2809, §746.2811

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

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40 TAC §746.2809

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC §42.042.

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SUBCHAPTER M. NAPTIME

40 TAC §746.2909

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER O. GET-WELL CARE PROGRAMS

40 TAC §746.3103, §746.3107

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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SUBCHAPTER P. NIGHTTIME CARE

40 TAC §746.3205

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

40 TAC §§746.3301, 746.3303, 746.3305, 746.3315, 746.3316

The amendments and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042.

§746.3301. What are the basic requirements for snack and mealtimes?

(a) You must serve all children ready for table food regular meals and morning and afternoon snacks as specified in this subchapter.

(1) If breakfast is served, a morning snack is not required.

(2) A child must not go more than three hours without a meal or snack being offered, unless the child is sleeping.

(3) If your child-care center is participating in the Child and Adult Care Food Program administered by the Texas Department of Agriculture, you may elect to meet those requirements rather than those specified in this subsection.

(b) You must ensure a supply of drinking water is always available to each child and is served at every snack, mealtime, and after active play in a safe and sanitary manner.

(c) You must not serve beverages with added sugars, such as carbonated beverages, fruit punch, or sweetened milk except for a special occasion such as a holiday or birthday celebration.

(d) You must not use food as a reward or punishment.

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SUBCHAPTER R. HEALTH PRACTICES
DIVISION 1. ENVIRONMENTAL HEALTH

40 TAC §§746.3401, 746.3403, 746.3405, 746.3409, 746.3411, 746.3427

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 2. DIAPER CHANGING

40 TAC §746.3503, §746.3505

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 3. ILLNESS AND INJURY

40 TAC §746.3601, §746.3603

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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SUBCHAPTER S. SAFETY PRACTICES
DIVISION 1. SAFETY PRECAUTIONS

40 TAC §746.3705

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 2. MEDICATIONS

40 TAC §746.3801

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 3. ANIMALS AT THE CHILD-CARE CENTER

40 TAC §746.3903, §746.3905

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 4. FIRST-AID KITS

40 TAC §746.4003

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

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SUBCHAPTER T. PHYSICAL FACILITIES

DIVISION 1. INDOOR SPACE REQUIREMENTS

40 TAC §746.4213, §746.4215

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 2. OUTDOOR SPACE REQUIREMENTS

40 TAC §746.4315

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 3. TOILETS AND SINKS

40 TAC §746.4423

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC §42.042.

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DIVISION 4. FURNITURE AND EQUIPMENT

40 TAC §746.4509

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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40 TAC §746.4511

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

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SUBCHAPTER U. INDOOR AND OUTDOOR ACTIVE PLAY SPACE AND EQUIPMENT

DIVISION 1. MINIMUM SAFETY REQUIREMENTS

40 TAC §§746.4601, 746.4603, 746.4605, 746.4607, 746.4609

The amendments and new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement HRC §42.042.

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40 TAC §746.4607, §746.4609

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

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DIVISION 3. MAINTENANCE

40 TAC §746.4751

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 4. USE ZONES

40 TAC §746.4803, §746.4805

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 5. SURFACING

40 TAC §§746.4901, 746.4907, 746.4908, 746.4915

The amendments and new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement HRC §42.042.

§746.4901. What type of surfacing must I have under my active play equipment?

(a) There must be loose-fill surfacing material or unitary surfacing material in the use zones (area around and under equipment where resilient surfacing is needed to prevent serious injury from occurring as result of a fall) for all climbing, rocking, rotating, bouncing, or moving equipment, slides, and swings.

(b) The height of the highest designated play surface on the equipment will determine the depth of loose materials or the attenuation rating (thickness) of the unitary materials.

§746.4907. How should outdoor loose-fill surfacing materials be installed?

(a) Loose-fill surfacing materials must be installed and maintained to a depth of:

(1) At least six inches when the height of the highest designated play surface is five feet or less; and

(2) At least nine inches when the height of the highest designated play surface is greater than five feet.

(b) You must not install loose-fill surfacing materials over concrete or asphalt.

(c) You must mark all equipment support posts to indicate the depth at which the loose-fill surfacing material must be maintained under and around the equipment.

(d) You must ensure the loose-fill materials are maintained at the proper depth at all times.

(e) Loose-fill surfacing materials must not be used indoors.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
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DIVISION 5. PLAYGROUND SURFACING

40 TAC §746.4903

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 6. SOFT CONTAINED PLAY EQUIPMENT

40 TAC §§746.4951, 746.4953, 746.4955

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.042.

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DIVISION 7. INFLATABLES

40 TAC §746.4971

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC §42.042.

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SUBCHAPTER V. SWIMMING POOLS AND WADING/SPLASHING POOLS

40 TAC §746.5003

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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40 TAC §746.5011

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

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SUBCHAPTER W. FIRE SAFETY AND EMERGENCY PRACTICES

DIVISION 1. FIRE INSPECTION

40 TAC §§746.5101, 746.5103, 746.5105

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 2. EMERGENCY EVACUATION AND RELOCATION

40 TAC §746.5201, §746.5203

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

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DIVISION 2. EMERGENCY PREPAREDNESS

40 TAC §§746.5201 - 746.5205

The new sections and amendment are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections and amendment implement HRC §42.042.

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DIVISION 3. FIRE EXTINGUISHING AND SMOKE DETECTION SYSTEMS

40 TAC §746.5301, §746.5311

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 4. GAS AND PROPANE TANKS

40 TAC §746.5401

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER X. TRANSPORTATION

40 TAC §746.5603, §746.5607

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042 and Transportation Code §545.412.

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40 TAC §§746.5603, 746.5605, 746.5607, 746.5609

The amendments and new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner

regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement HRC §42.042 and Transportation Code §545.412.

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CHAPTER 747. MINIMUM STANDARDS FOR CHILD-CARE HOMES

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§747.103, 747.105, 747.107, 747.207, 747.301, 747.303, 747.305, 747.403, 747.501, 747.605, 747.607, 747.613, 747.629, 747.703, 747.801, 747.901, 747.905, 747.907, 747.909, 747.1109, 747.1113, 747.1115, 747.1119, 747.1121, 747.1207, 747.1307, 747.1315, 747.1323, 747.1401, 747.1405, 747.1501, 747.1603, 747.1801, 747.2101, 747.2103, 747.2105, 747.2321, 747.2405, 747.2407, 747.2507, 747.2607, 747.3101, 747.3103, 747.3105, 747.3115, 747.3205, 747.3207, 747.3303, 747.3307, 747.3401, 747.3403, 747.3601, 747.3703, 747.3705, 747.3803, 747.4011, 747.4309, 747.4401, 747.4403, 747.4405, 747.4407, 747.4605, 747.4803, 747.5005, 747.5405, and 747.5409; new §§747.917, 747.3116, 747.4751, 747.5001, 747.5003, 747.5403, and 747.5407; and the repeal of §§747.1807, 747.2003, 747.2007, 747.2201, 747.4811, 747.5001, 747.5003, 747.5403, and 747.5407, in its Minimum Standards for Child-Care Homes chapter. The amendments to §§747.403, 747.1113, 747.1501, 747.1603, 747.2405, 747.3101 and 747.3105 and new §747.5003 are adopted with changes to the proposed text published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 4944). All other rules listed in the preamble are adopted without changes to the proposed text and will not be republished.

DFPS is required by Chapter 42 of the Human Resources Code (HRC) to evaluate minimum standard rules at least every six years. In addition, part of Licensing's business plan is to review, analyze, and update rules to strengthen the protection of children in out-of-home care and improve providers' understanding of the rules. The rules are revised to clarify current rule and update rules with current practices in the industry.

In order to update the minimum standards, input was obtained from providers, child-care workgroups, provider associations, and licensing staff. In addition, the changes incorporated were based on the review of minimum standards from other states, available research and literature relating to child-care, and health and safety practices recommended by experts, such as the Consumer Products Safety Commission (CPSC), the American Academy of Pediatrics (AAP), United States Department of Agriculture (USDA) and the National Highway Transportation Safety Administration (NHTSA).

Some of the significant changes are summarized below:

Subchapter A, Purpose and Definitions, is updated to include definitions for age appropriate and inflatable.

Subchapter B, Administration and Communication, includes a new requirement for centers to notify Licensing when there is a planned closure for five or more consecutive business days if they are not caring for children. This subchapter also clarifies that providers must continue to follow the state's general requirement for reporting suspected communicable disease. This is due to a change in 25 TAC Chapter 97 Subchapter A (relating to Control of Communicable Diseases) that no longer specifies child care in the rule. Other changes in this subchapter require providers to include in their policies an emergency preparedness plan, background check information must be kept confidential, and cellular phones at an operation must direct emergency personnel to the operation when calling 911.

Subchapter C, Record Keeping, is updated to allow for electronic tracking and records retention, and requires photo identification.

Subchapter D, Personnel, changes to this chapter include clarifying *full time* as 30 hours instead of the previous 40 hours per week, expands substituted experience to include teaching pre-kindergarten, expands credit courses for child development, clarifies that a certificate of coursework completion meets minimum qualifications, clarifies that caregivers must be free from the personal use of electronic devises (cell phones may be used briefly as long as appropriate supervision is maintained), expands annual training topics, and allows web-based learning and training.

Subchapter E, Child/Caregiver Ratios and Group Sizes, includes changing the number of children one caregiver may care for in licensed child care homes to be consistent with registered child-care homes.

Subchapter F, Developmental Activities and Activity Plan, is updated to require outdoor play to be scheduled for morning and afternoons. Based on the input from the day-care temporary workgroup, rules in this subchapter are updated to allow screen time activity, but it must be included in the written activity plan and must be related to planned activities, be age appropriate, and not last more than two hours a day.

Subchapter G, Basic Care Requirements For Children With Special Care Needs, is deleted. The repealed rule in this subchapter is moved to Subchapter F, relating to Developmental Activities and Activity Plans, so that provisions for special needs can be included during activity planning.

Subchapter I, Basic Care Requirements for Toddlers, is updated to include morning and afternoon opportunities for outdoor play; and requires any training cups used to have the child's first name and last initial on them, be color coded, or clean and sanitize them between each use.

Subchapter J, Basic Care Requirements for Pre-Kindergarten Age Children, and Subchapter K, Basic Care Requirements for School-Age Children, are updated to require the opportunity for outdoor play for pre-kindergarten age and school-age children in the morning and afternoon.

Subchapter Q, Nutrition and Food Service, is updated to reflect practices identified by the Department of State Health Services

Obesity Prevention Program and the Child and Adult Care Food Program. The changes include limiting the type and amount of juice children over the age of 12 months may be served; lowers the portion sizes based on the age of the child; and drinking water must be available and served during snack times, mealtime, and activity play.

Subchapter R, Health Practices, lowers the length of time an object must soak in disinfectant solution to two minutes; clarifies which commercial products qualify as disinfecting solutions; clarifies what safety mechanisms (or allows a caregiver's hand to remain on the child at all time) when diapering a child; amends the rule regarding fever to be consistent with current AAP recommendations; and clarifies that providers must continue to follow exclusions outlined by the Department of State Health Services.

Subchapter S, Safety Practices, is updated to delete the vaccination requirement for ferrets, and states non-glass thermometers are preferred in first-aid kits.

Subchapter T, Physical Facilities, allows lofts to be used as an extension of the learning area and the procedures that must be followed during their use.

Subchapter U, Indoor and Outdoor Active Play Space and Equipment, requires handrails on the steps and stairs of all climbing equipment except for rung ladders, prohibits children under four years of age from using chain or cable walks, over-head rings and parallel bars, and removes bounce houses from the listed items that children can use at and away from the child-care home. Measurements for slide use zones and the use of inflatables are specified.

Subchapter W, Fire Safety and Emergency Practices, renames Division 2 to be Emergency Preparedness. Changes to this subchapter include outlining what an emergency preparedness plan is and written procedures for evacuation and communication.

Subchapter X, Transportation, updates transportation requirements. The rules define general purpose vehicle, small school bus, and large school bus and outline which safety restraint systems must be used when transporting children.

The sections will function by reducing the risk to children and improving the quality of care due to updating standards based on current knowledge and practices.

During the public comment period, DFPS received comments from the Texas Early Childhood Education Coalition and 34 individuals. A summary of the comments and DFPS's responses follow:

Comments concerning §747.301(7): DFPS received three comments regarding notifying licensing of unexpected but planned closures. One commenter asked if notification was needed if a home is closed for fewer than five days, and another commenter asked if the vacation schedule would be subject to Licensing approval. One commenter expressed concern that notification was only needed if the absence was to occur at the same time as a scheduled Licensing inspection visit.

Response: DFPS is adopting this section without change. A home's designated hours of operation are established by the home itself and are submitted to Licensing either at the time of application or when there is a change in the designated hours of operation. This rule requires child-care homes to notify Licensing of any planned closures that occur outside their designated hours of operation. For example, a home that chooses to remain closed during specific times of the year such as local holiday school breaks, would report these scheduled closures in their designated hours of operation to their licensing inspector at the beginning of the school year. This rule requires reporting unexpected but planned closures, such as those due to reduced enrollment, that were not included in the designated hours of operation.

Comment concerning §747.403: One commenter questioned how to comply with this rule and how Licensing will verify completion.

Response: DFPS is withdrawing the proposed changes to add subsection (c) since there is not yet a reliable system available in all areas and among cellular phone providers that ensures a call made to 911 from a cell phone will automatically direct emergency personnel to the home.

Comment concerning §747.501: One commenter expressed concern with Licensing stipulating what should be included in operational policies.

Response: DFPS is adopting this section without change. The intent of the rule is to outline what information about the home's day-to-day operating procedures must be included in operational policies that are shared with parents. This exchange of information facilitates communication between the consumer and the provider and acts as a protection for children in care.

Comment concerning §747.801: One commenter asked for clarification regarding which background checks need to be on file: for all or just current employees.

Response: Rules related to background checks are established in Chapter 745. Licensing staff can provide technical assistance on which pieces of information should be maintained in the child care home. DFPS is adopting this section without change.

Comment concerning §747.901: One commenter supported the rule.

Response: DFPS is adopting this section without change.

Comment concerning §747.1207: One commenter suggested an alternate way to verify high school completion in lieu of a diploma would be to allow a college transcript from an accredited college to be considered proof of required education.

Response: DFPS is adopting this section without change. The intent of this change is to clarify that an individual who can provide documentation that they have completed and passed all courses required for high school graduation meets minimum qualifications. A transcript from an accredited college may be accepted as proof of required education.

Comments concerning §747.1315: DFPS received two comments. One commenter expressed concern regarding addition of the Texas Trainer Registry and is concerned that this is an endorsement that will one day lead to the requirement that all trainers be listed in the registry. One commenter questioned how a Licensing representative would verify this during an inspection.

Response: The Texas Trainer Registry is listed as an acceptable option that child care providers may use when seeking training for themselves and for their staff. Licensing will continue to determine compliance regarding training through review of documentation as outlined in §747.1327. DFPS is adopting this section without change.

Comments concerning §747.1501: DFPS received two comments. One commenter expressed concern that if providers

are considered responsible enough to care for kids they should be responsible enough to set their own limits regarding the personal use of electronics. The second commenter suggested that the use of personal electronics be allowed during naptime.

Response: The purpose of the requirement is to prohibit personal use of electronic devices that would interfere with a caregiver being able to appropriately supervise the children in her care. Use of a caregiver's personal cell phone for a business related reason, including contacting the parent or EMS in the event of an emergency or illness, would be permissible.

DFPS is adopting this section with changes to subsection (c)(6)(C) to add language to clarify that a cell phone may be used for necessary calls as long as appropriate supervision is maintained.

Comments concerning §747.1603: DFPS received seven comments, three in support of the rule. Three commenters were concerned counting four-year olds as school-age children. Two of these commenters were concerned that supervision would be a problem due to an increased number of children in the home. One commenter suggested that a 1:10 ratio should be allowed, and was concerned that the standard was discriminating to privately run pre-kindergarten programs. One commenter sought clarification on whether this rule applied to both licensed and registered homes.

Response: The intent of this change is to allow four year olds attending a pre-kindergarten program operated by or in collaboration with a local public school district to be counted in the same way children five years old and older who are in care after school hours are counted. This change does not impact the total number of children that may be in care at any one time. This change applies only to registered child-care homes. DFPS is adopting this section with changes to paragraph (5) to clarify that this rule only applies to registered child-care homes, and a "school age child" means a child five years old or older who is in care after school.

Comments concerning §747.1801: DFPS received 19 comments concerning this rule. One commenter supported the change, stating it would equalize the standard between registered and licensed homes. Four commenters noted that the ratios for registered and licensed homes were now identical and questioned the benefit of becoming a licensed home given this scenario.

Thirteen commenters opposed the rule stating the amendment lowers the number of children that a Licensed home can care for. One commenter stated licensed homes should be allowed to care for more children than registered homes.

Response: DFPS is adopting this section without change. The intent of this rule is to align licensed home ratios to those of registered homes when caring for three or four children under the age of 18 months.

The changes do not lower the ratio, but instead increase the ratio for a single caregiver in a licensed home. Currently a registered home provider may care for seven children total when caring for three children under the age of 18 months; while a licensed home provider may only care for a total of six children when three children under the age of 18 months are in care. As outlined in §747.1803, when there are two or more caregivers present in a licensed home 12 children may be in care regardless of ages. However, this is not true in a registered child-care home.

Comment concerning §747.2101: One commenter requested clarification whether or not an activity plan must be in writing.

Response: The intent of this rule is to clarify that activity plans must take into account the needs of all children in care, including those with special care needs. No changes are being made to §747.2107, which outlines that the activity plan does not have to be written. DFPS is adopting this section without change.

Comments concerning §747.2103: DFPS received four comments. One commenter supported the rule and recommended that the activity plan include outdoor time in both the morning and afternoon, as it would aid in reducing the number of overweight children. Two commenters expressed concerns that it will be difficult to ensure that children play outside both mornings and afternoons due to the weather. One commenter suggested that the phrase "when weather appropriate" be added.

Response: DFPS is adopting this section without change. Giving children multiple opportunities to play outside when weather conditions permit, helps to ensure children engage in 60 to 90 minutes of active play daily. This is supported by the American Academy of Pediatrics, and the U.S. Department of Health and Human Services as outlined in the *Surgeon General's Vision for a Healthy and Fit Nation 2010.*

The flexibility to consider appropriate weather conditions, when planning outdoor play is currently provided in the requirements regarding activities for each age group in §§747.2407, 747.2507 and 747.2607. Licensing will continue to offer providers technical assistance in assessing weather conditions.

Comment concerning §747.2103: One commenter stated the rule was unnecessary since children do not normally just sit in front of the television for extended periods of time.

Response: DFPS is adopting the section without change. The intent of this rule is to ensure that if screen time activities are offered, children who do not want to participate have the option to take part in a planned alternative activity instead.

Comments concerning §747.2105: DFPS received two comments, one in support of the rule. The second commenter stated that providing guidelines for screen time activities is unnecessary.

Response: DFPS is adopting this section without change. The American Academy of Pediatrics recommends limits on screen time for children older than two years to be no more than one to two hours per 24 hour period.

Comments concerning §747.2405: DFPS received three comments. One commenter stated this rule is already addressed in §747.2319. Two commenters believe that the rule should allow for a color coded system in lieu of names.

Response: The intent of this rule is to ensure that training cups used by toddlers are maintained in a sanitary manner. The requirement outlined in §747.2319 is similar but only applies to bottles and training cups used by infants in care. The use of different colors for each child meets the intent and will be allowed as long as there is a way to verify which cup color is associated with each child, such as a color-code chart.

DFPS is adopting this section with changes to paragraph (4) to clarify that: (a) if names are not used, then there is a system in place so training cups are individually assigned to each child; or (b) training cups are cleaned and sanitized between each use.

Comments concerning §§747.2407, 747.2507, and 747.2607: For each of these rules DFPS received three comments regarding outdoor play for toddlers, pre-kindergarten age children, and school-age children respectively. One commenter supported the rules. One commenter stated concern it may be difficult to play outdoors in the morning and afternoon depending on the weather. One commenter suggested leaving the rules as is.

Response: DFPS is adopting these sections without change. Giving children multiple opportunities to play outside when weather conditions permit, helps to ensure children engage in 60 to 90 minutes of active play daily. This is supported by the American Academy of Pediatrics, and the U.S. Department of Health and Human Services as outlined in the Surgeon General's *Vision for a Healthy and Fit Nation 2010.* Each rule specifically states that outside play is "when weather permits." Licensing will continue to offer providers technical assistance in assessing weather conditions.

Comments concerning §747.3101: DFPS received five comments. One commenter supported the rule, while four commenters expressed concerns. Three commenters requested that the requirement for water continue to be "always available" instead of "served at each meal and snack time." One commenter was concerned that each child would now be required to use two cups at snack and mealtimes. One commenter suggested that disallowing all sweetened drinks is too harsh but limiting them would be acceptable.

Response: The purpose of subsection (b) is for children to be served water during meals and at snack time. Although this requirement may be met in a variety of ways, providing access alone does not meet the purpose of the rule. Research indicates serving drinking water to children ensures they are properly hydrated and facilitates reducing the intake of extra calories from nutrient poor foods and drinks which are associated with weight gain and obesity. Water may be served in the same cup as milk or juice. It is reasonable to serve or ask the children to serve themselves the milk or juice that is being offered as a part of the meal or snack before serving the water. Liquids with added sugars provide less nutritional value overall and should be avoided as they also promote tooth decay. This is supported by the American Academy of Pediatrics. The U.S. Department of Health and Human Services, as outlined in the *Surgeon General's Vision for a Healthy and Fit Nation 2010,* also supports reducing consumption of sodas and juices with added sugars.

DFPS is adopting subsection (c) with changes to clarify that beverages with added sugars may be served for special occasions such as holidays or birthday celebrations.

Comment concerning §747.3117: DFPS received one comment supporting the rule.

Response: DFPS is adopting this section without change.

Comment concerning §747.3205: DFPS received one comment supporting the rule.

Response: DFPS is adopting this section without change.

Comment concerning §747.3207: DFPS received one comment opposed to the rule. The commenter believes that if a local health department deems another solution more effective it should be allowable.

Response: DFPS is adopting this section without change. The intent of this rule is to outline what is considered an acceptable disinfecting solution and is based on the recommendations from the American Academy of Pediatrics. Requests to use products that do not meet the requirement can be evaluated by Licensing on a case-by-case basis.

Comments concerning §747.3303: DFPS received two comments concerning this rule. One commenter was concerned with the rule and suggested that safety straps along with one hand be used to prevent a child from falling during diaper changing. One commenter requested that Licensing consider cloth-backed plastic and vinyl sheets as acceptable diaper changing surfaces since these items can be laundered and reused.

Response: DFPS is adopting this section without change. The intent of this rule is to clarify examples of safety mechanisms that may be used when changing a child's diaper above floor level, including safety straps, raised sides, or a caregiver's hand that remains on the child at all times. This is consistent with recommendations from the American Academy of Pediatrics.

A smooth, non-absorbent and easy to clean diaper changing table or surface that is sanitized after each use or covered with a clean disposable covering that is changed after each use reduces the spread of germs from child to child and the risk of infection in a group care setting.

Comment concerning §747.3401: One commenter was concerned that by increasing the temperature this would allow the child to remain in care and spread germs/illness for a longer period of time.

Response: DFPS is adopting the section without change. The language is consistent with current American Academy of Pediatrics recommendations.

Comment concerning §747.3403: One commenter was concerned that there are some instances where a child is not allowed to return to care, even if the child's doctor has said he may return to care.

Response: DFPS is adopting this section without change. The intent of this rule change is to update the state agency reference. Section 747.3401 outlines that a child may return to care as long as he has been evaluated by a health-care professional who has indicated that the child may be included in the child-care activities.

Comment concerning §747.3803: DFPS received one comment opposed to the requirement of non-glass thermometers and suggests the wording "preferably non-glass" be deleted.

Response: DFPS is adopting this section without change. The intent of the rule change is to follow the American Academy of Pediatrics recommendations regarding items to be included in a first-aid kit. This is a safe option that allows greater flexibility to providers.

Comment concerning §747.4403: DFPS received one comment suggesting that a definition or example of a giant stride be given.

Response: DFPS is adopting this section without change. Licensing will offer technical assistance and can address questions regarding individual types and designs of equipment, including sharing photos or descriptions of equipment as needed.

Comments concerning §747.4405: DFPS received two comments. One commenter expressed concerns regarding the rule and suggested that some children may be physically advanced and able to use the restricted pieces of equipment. One commenter suggested adding an example or definition to clarify what fulcrum seesaw and track rides are.

Response: DFPS is adopting this section without change. The intent of the rule is to outline what equipment is not developmentally appropriate for children under the age of five; the changes are consistent with guidelines for public playgrounds in the Consumer Product Safety Commission Public Playground Safety Handbook. Licensing will offer technical assistance and can address questions regarding individual types and designs of equipment, including sharing photos or descriptions of equipment as needed.

Comment concerning §747.4605: One commenter was concerned that it is costly for homes to comply with frequently changing use zones if their equipment has been permanently installed. The commenter suggested that a clause be added to exempt homes in operation prior to the effective date of this rule.

Response: DFPS is adopting this section without change. The intent of this rule is to clarify the use zones for slides based on guidelines in the Consumer Product Safety Commission Public Playground Safety Handbook. The use zone for slides up to six feet remains the same while the use zone for slides greater than six feet is decreased. Licensing does not anticipate that providers will have to adjust equipment or use zones to meet the new requirements.

Comment concerning §747.5003: One commenter asked for clarification of child tracking system information.

Response: DFPS is adopting this section with a change to subsection (c)(3) to replace "child tracking system" with "attendance record" to clarify that attendance record information for children present at the time of an emergency is required for the emergency preparedness plan.

Comment concerning §747.5005: One commenter suggested that the term "shelter in place" be used in lieu of "severe weather."

Response: DFPS is adopting this section without change. The intent of this rule is to ensure that caregivers and children in care have the opportunity to practice and become familiar with emergency preparedness plans. Depending on the type of emergency, it may be appropriate to leave the home (evacuate) or to stay at the home (shelter-in-place).

General comments for Chapter 747: DFPS received 10 general comments, four supporting all the rules. One comment opposed all of the rules.

(1) Two commenters expressed a desire for stronger regulation of listed homes.

Response: The Human Resources Code, §42.044 only permits Licensing to investigate listed homes when a complaint of abuse or neglect of a child is received.

(2) Two commenters were concerned about the format and organization of the minimum standards publication.

Response: The rules are written in a question and answer format reflecting the use of plain language recommended and used in federal and state law.

(3) One commenter was concerned about inspection information being posted on the website.

Response: Child Care Licensing's mission is to ensure the health and safety of children while they are in care. Part of that responsibility involves assisting parents in making informed decisions about child care.

In addition to comments on proposed rules, DFPS received a comment on §747.3121, stating that there is not enough room on a toothbrush for a child's name. No changes were proposed to this rule; however, it is important for health reasons to make sure that toothbrushes are identified. Tape with a name on a toothbrush should suffice for this purpose. DFPS is not recommending any changes at this time.

In addition to changes as a result of comments, DFPS is adopting §747.1113 with a change to subsection (a)(3) to add that the experience can come from another country. This change will help clarify that experience in another country counts toward director qualifications and will make the rule consistent with a similar rule in Chapter 744. Also, DFPS is adopting §747.3105 with changes to subsection (b) to clarify "1%" milk to correct an error in the proposed text.

SUBCHAPTER A. PURPOSE AND DEFINITIONS

40 TAC §§747.103, 747.105, 747.107

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gerry Williams
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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION
DIVISION 1. PRIMARY CAREGIVER

40 TAC §747.207

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Ser-

vices Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 2. REQUIRED NOTIFICATIONS

40 TAC §§747.301, 747.303, 747.305

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 3. REQUIRED POSTINGS

40 TAC §747.403

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§747.403. What telephone numbers must I post and where must I post them?

(a) You must post the following telephone numbers:

(1) 911 or, if 911 is not available in your area, you must post the numbers for:

(A) Emergency medical services;

(B) Law enforcement; and

(C) Fire department;

(2) Poison control;

(3) DFPS child abuse hotline;

(4) Nearest Licensing office telephone number and address; and

(5) Your name, home address, and telephone number.

(b) You must post the telephone numbers next to each telephone in the child-care home. If you use a cordless or cellular phone, you must post these same numbers in a prominent place on the wall near the base of the phone or on the handset.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. OPERATIONAL POLICIES

40 TAC §747.501

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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SUBCHAPTER C. RECORD KEEPING

DIVISION 1. RECORDS OF CHILDREN

40 TAC §§747.605, 747.607, 747.613, 747.629

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 2. RECORDS OF ACCIDENTS AND INCIDENTS

40 TAC §747.703

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 3. RECORDS THAT MUST BE KEPT ON FILE AT THE CHILD-CARE HOME

40 TAC §747.801

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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DIVISION 4. RECORDS ON CAREGIVERS AND HOUSEHOLD MEMBERS

40 TAC §§747.901, 747.905, 747.907, 747.909, 747.917

The amendments and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services

Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042.

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SUBCHAPTER D. PERSONNEL
DIVISION 2. PRIMARY CAREGIVER OF A LICENSED CHILD-CARE HOME

40 TAC §§747.1109, 747.1113, 747.1115, 747.1119, 747.1121

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§747.1113. What constitutes experience in a licensed child-care center, or in a licensed or registered child-care home?

(a) Only the following types of experience may be counted as experience in a licensed child-care center:

(1) Experience as a director, assistant director, or as a caregiver working directly with children, obtained in any DFPS licensed child-care center, whether paid or unpaid;

(2) Experience as a director, assistant director or caregiver working directly with children, whether paid or unpaid, in a DFPS licensed day-care center, group day-care home, kindergarten and nursery school, school: grades kindergarten and above, drop-in care center, or in a DFPS alternatively accredited program; and

(3) Experience as a director, assistant director, or caregiver working directly with children in a licensed or certified child-care center in another state or country.

(b) Only the following types of experience may be counted as experience in a licensed or registered child-care home:

(1) Experience as a primary caregiver or assistant caregiver working directly with children, whether paid or unpaid, in a DFPS licensed or registered child-care home;

(2) Experience as a director, assistant director, or caregiver working directly with children, whether paid or unpaid in a DFPS licensed group day-care home; or

(3) Experience as a primary caregiver of a DFPS registered family home.

(c) You must have obtained all work experience in a full-time capacity or its equivalent in a part-time capacity. Full-time is defined as 30 hours per week.

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DIVISION 3. ASSISTANT AND SUBSTITUTE CAREGIVERS

40 TAC §747.1207

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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DIVISION 4. PROFESSIONAL DEVELOPMENT

40 TAC §§747.1307, 747.1315, 747.1323

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421(e).

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DIVISION 5. HOUSEHOLD MEMBERS, VOLUNTEERS, AND PEOPLE WHO OFFER CONTRACTED SERVICES

40 TAC §747.1401, §747.1405

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 6. GENERAL RESPONSIBILITIES FOR CAREGIVERS AND HOUSEHOLD MEMBERS

40 TAC §747.1501

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§747.1501. What general responsibilities do caregivers have in my child-care home?

(a) You and all other caregivers are responsible for seeing that children are:

(1) Treated with courtesy, respect, acceptance, and patience;

(2) Recognized and respected for their uniqueness as an individual;

(3) Not abused, neglected, or exploited; and

(4) Released only to a parent or a person designated by a parent.

(b) You and all other caregivers must report suspected abuse, neglect, or exploitation to DFPS as specified in Texas Family Code §261.101.

(c) You and all other caregivers must also:

(1) Demonstrate competency, good judgment, and self-control in the presence of children;

(2) Know and comply with the minimum standards specified in this chapter;

(3) Know each child's name and have information showing the child's age;

(4) Supervise children at all times, as specified in §747.1503 of this title (relating to What does Licensing mean by "supervise children at all times"?);

(5) Ensure the children are not out of control;

(6) Be free from other activities not directly involving the teaching, care, and supervision of children, such as:

(A) Administrative and clerical duties that take the caregiver away from the children except for brief periods, such

as for necessary phone calls, as long as appropriate supervision is maintained;

(B) Janitorial duties, such as mopping, vacuuming, and cleansing bathrooms. Sweeping up after an activity or mopping up spills may be necessary for the children's safety and are not considered janitorial duties; and

(C) Personal use of electronic devices, such as MP3 players, video games, and cell phones. Cell phones may be briefly used for necessary phone calls, as long as appropriate supervision is maintained; and

(7) Interact with children in a positive manner.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. CHILD/CAREGIVER RATIOS AND GROUP SIZES

DIVISION 1. DETERMINING CHILD/CARE-GIVER RATIOS AND GROUP SIZES

40 TAC §747.1603

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§747.1603. How do I determine child/caregiver ratio?

In determining child/caregiver ratio, the following apply:

(1) The total number of children you may supervise is determined by the ages of the children in the child-care home.

(2) You may use the developmental or emotional age, rather than the chronological age, of a child with special care needs, if this is recommended by a health-care professional or a qualified professional and is documented in the child's record.

(3) All children present, including children related to you, assistant and substitute caregiver's children, and drop-in and part-time children must be counted in the child/caregiver ratio, by age of the child, regardless of the length of time they are present.

(4) You must also count neighborhood children visiting your child-care home, if you are responsible for their care and supervision in the absence of the parent.

(5) In a registered child-care home, you may count a child who is at least four years of age and attending a pre-kindergarten program during the customary school day in the same way children five years old and older who are in care after school hours are counted. The pre-kindergarten program must be operated by or in collaboration with the local school district.

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DIVISION 3. REGULAR RATIOS AND GROUP SIZES IN THE LICENSED CHILD-CARE HOME

40 TAC §747.1801

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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40 TAC §747.1807

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 5. RATIOS FOR WATER ACTIVITIES

40 TAC §747.2003, §747.2007

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

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SUBCHAPTER F. DEVELOPMENTAL ACTIVITIES AND ACTIVITY PLAN

40 TAC §§747.2102, 747.2103, 747.2105

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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SUBCHAPTER G. BASIC CARE REQUIREMENTS FOR CHILDREN WITH SPECIAL CARE NEEDS

40 TAC §747.2201

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

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SUBCHAPTER H. BASIC CARE REQUIREMENTS FOR INFANTS

40 TAC §747.2321

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER I. BASIC CARE REQUIREMENTS FOR TODDLERS

40 TAC §747.2405, §747.2407

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§747.2405. What furnishings and equipment must I provide for toddlers?

Furnishings and equipment for toddlers must include at least the following:

(1) Age-appropriate nap or rest equipment;

(2) Enough popular items are available so that toddlers are routinely engaged in either solitary or parallel play;

(3) Containers or low shelving so items children can safely use without direct supervision are accessible to children during the activity; and

(4) Training cups if used, that are:

(A) Labeled with the child's first name and initial of last name or otherwise individually assigned to each child; and/or

(B) Cleaned and sanitized between each use.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER J. BASIC CARE REQUIREMENTS FOR PRE-KINDERGARTEN AGE CHILDREN

40 TAC §747.2507

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER K. BASIC CARE REQUIREMENTS FOR SCHOOL-AGE CHILDREN

40 TAC §747.2607

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

40 TAC §§747.3101, 747.3103, 747.3105, 747.3115, 747.3116

The amendments and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042.

§747.3101. What are the basic requirements for snack and mealtimes?

(a) You must serve all children ready for table food regular meals and morning and afternoon snacks as specified in this subchapter.

(1) If breakfast is served, a morning snack is not required.

(2) A child must not go more than three hours without a meal or snack being offered, unless the child is sleeping.

(3) If your child-care home is participating in the Child and Adult Care Food Program administered by the Texas Department of Agriculture, you may elect to meet those requirements rather than those specified in this subsection.

(b) You must ensure a supply of drinking water is always available to each child and is served at every snack, mealtime, and after active play in a safe and sanitary manner.

(c) You must not serve beverages with added sugars, such as carbonated beverages, fruit punch, or sweetened milk except for a special occasion such as a holiday or birthday celebration.

(d) You must not use food as a reward or punishment.

§747.3105. How do I know what a child's daily food needs are?

(a) The daily food needs for children 12 months through two years are included in the following chart:
Figure: 40 TAC §747.3105(a)

(b) The daily food needs for children three years through five years are included in the following chart:
Figure: 40 TAC §747.3105(b)

(c) The daily food needs for children six years and older are included in the following chart:
Figure: 40 TAC §747.3105(c)

(d) You must serve enough food to allow children second servings from the vegetable, fruit, grain, and milk groups.

(e) If your home is participating in the Child and Adult Care Food Program administered by the Texas Department of Agriculture, you may elect to meet those requirements rather than those specified in this section.

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SUBCHAPTER R. HEALTH PRACTICES
DIVISION 1. ENVIRONMENTAL HEALTH

40 TAC §747.3205, §747.3207

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which

provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 2. DIAPER CHANGING

40 TAC §747.3303, §747.3307

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 3. ILLNESS AND INJURY

40 TAC §747.3401, §747.3403

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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SUBCHAPTER S. SAFETY PRACTICES

DIVISION 2. MEDICATION

40 TAC §747.3601

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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DIVISION 3. ANIMALS AT MY CHILD-CARE HOME

40 TAC §747.3703, §747.3705

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 4. FIRST-AID KITS

40 TAC §747.3803

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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SUBCHAPTER T. PHYSICAL FACILITIES
DIVISION 1. INDOOR SPACE REQUIREMENTS

40 TAC §747.4011

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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DIVISION 4. FURNITURE AND EQUIPMENT

40 TAC §747.4309

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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SUBCHAPTER U. INDOOR AND OUTDOOR ACTIVE PLAY SPACE AND EQUIPMENT
DIVISION 1. MINIMUM SAFETY REQUIREMENTS

40 TAC §§747.4401, 747.4403, 747.4405, 747.4407

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 3. PLAYGROUND USE ZONES

40 TAC §747.4605

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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DIVISION 5. INFLATABLES

40 TAC §747.4751

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

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SUBCHAPTER V. SWIMMING POOLS AND WADING/SPLASHING POOLS

40 TAC §747.4803

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including

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The amendment implements HRC §42.042.

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40 TAC §747.4811

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

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SUBCHAPTER W. FIRE SAFETY AND EMERGENCY PRACTICES

DIVISION 2. EMERGENCY EVACUATION AND RELOCATION

40 TAC §747.5001, §747.5003

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

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DIVISION 2. EMERGENCY PREPAREDNESS

40 TAC §§747.5001, 747.5003, 747.5005

The new sections and amendment are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections and amendment implement HRC §42.042.

§747.5003. What must my emergency preparedness plan include?

Your emergency preparedness plan must include written procedures for:

(1) Evacuation, including:

(A) That in an emergency, your first responsibility is to move the children to a designated safe area or alternate shelter known to all household members, caregivers, and volunteers;

(B) How children will be relocated to the designated safe area or alternate shelter;

(C) An emergency evacuation and relocation diagram as outlined in §747.5007 of this title (relating to Must I have an emergency evacuation and relocation diagram?);

(D) Name and address of the alternate shelter away from the home you will use as needed; and

(E) How children in attendance at the time of the emergency will be accounted for at the designated safe area or alternate shelter.

(2) Communication, including:

(A) The emergency telephone number that is on file with us;

(B) How you will communicate with local authorities (such as fire, law enforcement, emergency medical services, health department), parents, and us; and

(3) How you will evacuate with the essential documentation including:

(A) Parent and emergency contact telephone numbers for each child in care;

(B) Authorization for emergency care for each child in care; and

(C) The attendance record information for children in care at the time of the emergency.

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SUBCHAPTER X. TRANSPORTATION

40 TAC §747.5403, §747.5407

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042 and Transportation Code §545.412.

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40 TAC §§747.5403, 747.5405, 747.5407, 747.5409

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The amendments and new sections implement HRC §42.042 and Transportation Code §545.412.

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For further information, please call: (512) 438-3437

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CHAPTER 749. CHILD-PLACING AGENCIES
SUBCHAPTER M. FOSTER HOMES: SCREENINGS AND VERIFICATIONS

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§749.2471, 749.2489, 749.2521, 749.2801, 749.2803, and 749.2819; and new §§749.2495, 749.2520, 749.2527, 749.2529, 749.2531, and 749.2814, without changes to the proposed text published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 7009). The changes are primarily a result of feedback received from Child Protective Services (CPS) that it would be beneficial to allow them to add time-limits to foster home verifications in certain circumstances. Currently all verifications are considered non-expiring, meaning they do not have an end date.

The rules associated with time-limited verifications are optional, meaning that providers are not required to associate time limits with any foster home verification. If providers do choose to set time limits for foster home verifications, the rules will provide direction and guidance for when and how providers will issue and manage time limited verifications for foster homes.

The amendment to §749.2471 outlines the requirements for verifying a foster home. The proposal: (1) adds the requirement for a foster care capacity on each foster home's verification certificate. This information is already being reported to DFPS, so this is something that agencies are already doing to a lesser extent; (2) clarifies that the documentation of ages and gender(s) of children for which the home is verified is limited to children for whom the family provides foster care or respite child-care, the documentation is not required on all children in the home (such as biological children); (3) adds that a foster home verification certificate includes which agency main or branch office issued the verification; and (4) adds the expiration date, if applicable, to the verification certificate.

The amendment to §749.2489 includes the requirement that extending a time-limited verification or changing a time-limited verification to a non-expiring verification must be reported to Licensing.

New §749.2495 clarifies that only temporary and time-limited verifications have expiration dates, all other verifications are non-expiring.

New §749.2520 states the purpose of temporary and time-limited verifications. The purpose of a temporary verification is not new and is being moved from existing §749.2521. The purpose of a time-limited verification is new, and it establishes an end date; the rule also sets forth the expectation that homes with time-limited verifications must meet the same rules as foster parents with non-expiring verifications. As a result, §749.2521 is revised to delete the temporary verification purpose.

New §749.2527 requires the same verification procedures to be followed for time-limited verifications as for non-expiring verifications.

New §749.2529 allows time-limited verifications to be issued for any length of time the provider determines is appropriate.

New §749.2531 allows for the extension of time-limited verifications or the ability to change from time-limited to non-expiring verification.

The amendment to §749.2801 includes the requirement that foster homes be evaluated for compliance with all rules when a time-limited verification is extended or when changing the status of verification from time-limited to non-expiring.

The amendment to §749.2803 outlines the circumstances under which a foster home's verification certificate is valid and when a new temporary verification certificate must be issued.

New §749.2814 requires a foster home to be evaluated according to each applicable rule prior to the extension of its time-limited verification or changing its verification from time-limited to non-expiring.

The amendment to §749.2819 allows homes with time-limited verifications to be placed on inactive status only if their verification has not yet expired.

The amendments and new sections will function by ensuring that children in CPS conservatorship will achieve permanency because there will be more options to relatives willing to care for the children.

No comments were received regarding adoption of the sections.

DIVISION 3. VERIFICATION OF FOSTER HOMES

40 TAC §§749.2471, 749.2489, 749.2495

The amendments and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042 and §42.056.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 4, 2010.

TRD-201006261
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: December 1, 2010
Proposal publication date: August 13, 2010
For further information, please call: (512) 438-3437

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DIVISION 4. TEMPORARY AND TIME-LIMITED VERIFICATIONS

40 TAC §§749.2520, 749.2521, 749.2527, 749.2529, 749.2531

The new sections and amendment are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections and amendment implement HRC §42.042 and §42.056.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 4, 2010.

TRD-201006262

Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: December 1, 2010
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For further information, please call: (512) 438-3437

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SUBCHAPTER N. FOSTER HOMES: MANAGEMENT AND EVALUATION

40 TAC §§749.2801, 749.2803, 749.2814, 749.2819

The amendments and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042 and §42.056.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 4, 2010.

TRD-201006263
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: December 1, 2010
Proposal publication date: August 13, 2010
For further information, please call: (512) 438-3437

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

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Texas Department of Insurance

Title 28, Part 1

The Texas Department of Insurance will review and consider for readoption, revision, or repeal all sections of the following chapters of Title 28, Part 1 of the Texas Administrative Code, in accordance with the Texas Government Code §2001.039: Chapter 5, Property and Casualty Insurance; Chapter 7, Corporate and Financial Regulation; Chapter 11, Health Maintenance Organizations; Chapter 15, Surplus Lines Insurance; Chapter 19, Agents' Licensing; Chapter 21, Trade Practices; Chapter 23, Prepaid Legal Service; and Chapter 26, Small Employer Health Insurance Regulations.

The Department will consider whether the reasons for initially adopting these rules continue to exist and whether these rules should be repealed, readopted, or readopted with amendments. Any repeals or necessary amendments identified during the review of these rules will be proposed and published in the *Texas Register* in accordance with the Administrative Procedure Act, Texas Government Code Chapter 2001.

To be considered, written comments relating to whether these rules should be repealed, readopted, or readopted with amendments must be submitted within 30 days following the publication of this notice in the *Texas Register* to Gene C. Jarmon, General Counsel and Chief Clerk, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments should be sent to Norma Garcia, Special Projects Counsel, Legal and Regulatory Affairs, P.O. Box 149104, MC 110-1A, Austin, Texas 78714-9104.

Comments should clearly specify the particular section of the rule to which they apply. Comments should include proposed alternative language as appropriate. General comments should be designated as such.

TRD-201006388
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 5, 2010

Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas files this notice of intent to review and re-adopt 16 TAC Chapter 4, relating to Environmental Protection, in accordance with Texas Government Code, §2001.039. The agency's reasons for adopting these rules continue to exist. In a separate, concurrent rulemaking, the Commission proposes some non-substantive amendments to various rules in Chapter 4.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register.* The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Kellie Martinec at (512) 475-1295. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.php.

Issued in Austin, Texas, on November 2, 2010.

TRD-201006258
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Filed: November 4, 2010

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 22 TAC §1.191(b)

Subjects Related to Design and Construction Documents	Minimum Training Hours Required
Programming	80
Site and Environmental Analysis	80
Schematic Design	120
Engineering Systems Coordination	120
Building Cost Analysis	80
Code Research	120
Design Development	320
Construction Documents	1,080
Specifications and Materials Research	120
Documents Checking and Coordination	80
Elective Units in Design and Construction Documents	600

Figure: 22 TAC §1.191(c)

Subjects Related to Construction Administration	Minimum Training Hours Required
Bidding and Contract Negotiation	80
Construction Phase (office)	120
Construction Phase (observation)	120
Elective Units in Construction Administration	240

Figure: 22 TAC §1.191(d)

Subjects Related to Management	Minimum Training Hours Required
Project Management	120
Office Management	80
Elective Units in Management	80

Figure: 22 TAC §1.191(g)

Training Setting	Maximum Training Hours Awarded
Training Setting A Training under the Supervision and Control of a registered architect when the organization's practice (1) is in the charge of a registered architect practicing as a principal and (2) encompasses the comprehensive practice of architecture	No limit Every Applicant must earn at least 1,880 Training Hours in Training Setting A.
Training Setting B Training under the Supervision and Control of a registered architect when the organization's practice *does not* encompass the comprehensive practice of architecture	3,720 Training Hours
Training Setting C Training in a firm engaged in the practice of architecture outside the U.S. when such training is under the Supervision and Control of a person practicing architecture who is not registered in a U.S. jurisdiction	1,880 Training Hours
Training Setting D Experience directly related to architecture under the Supervision and Control of a registered engineer practicing as a structural, civil, mechanical, or electrical engineer in the field of building construction or under the Supervision and Control of a registered landscape architect	1,880 Training Hours
Training Setting E Experience (other than that noted above in A through D) in activities involving the design and construction of the built environment, such as analysis of existing buildings, planning, programming, design of interior space, review of technical submissions, and engaging in building construction activities, when such experience is under the Supervision and Control of a person experienced in the activity	936 Training Hours

Training Setting F Full-time teaching or research in an NAAB-accredited professional degree program	1,960 Training Hours To earn Training Hours in Training Setting F, an Applicant must be employed as a teacher or researcher on a full-time basis.
Training Setting G Performing professional and community service when not in any of the settings described above in A through F	80 Training Hours

Figure: 22 TAC §5.202(b)

Description of Experience		**Credit Allowed**	**Maximum Credit**
ID-7	Diversified experience directly related to Interior Design as an employee working under the Direct Supervision of a Registered Interior Designer or architect	Full credit	No limit
ID-8	Diversified experience directly related to Interior Design when the experience is not under the Direct Supervision of a Registered Interior Designer or architect	Half credit	1 year
ID-9	Teaching on a full-time basis in a CIDA-accredited program in Interior Design	Full credit	1 year

Figure: 22 TAC §5.202(c)

	Minimum Hours of Experience
1. Programming	**570 Total**
a. Client Requirements	135
b. Research	75
c. Space and Conditions Analysis	125
d. Client/User Interviews	45
e. Life Safety and Code Requirements	90
f. Problem Solving	100
2. Schematic Design	**445 Total**
a. Design Concept	110
b. Space Relationships	90
c. Client Meetings	15
d. Preliminary Drawings	90
e. Preliminary Budget and Cost	75
f. Color Concept	65
3. Design Development	**1240 Total**
a. Space Planning	210
b. Furniture, Fixtures, and Equipment Layout	140
c. Lighting Plans and Preliminary Specs	145
d. Electrical Plans and Preliminary Specs	75
e. Reflected Ceiling Plan	85
f. Plumbing Plans and Preliminary Specs	75
g. Detailing-Millwork, Custom Cab. and Furn.	135
h. Furnishing and Textile Selection	95
i. Materials and Finish Selection	90
j. Budgeting	95
k. Presentations-Oral, Written, Graphic	95
4. Contract Documents	**655 Total**
a. Working Drawings-Interior Construction	195
b. Working Drawings-Custom Cab. and Furn.	145
c. Spec Writing	140
d. Bidding and Contract Documents	80
e. Purchase Documents	95
5. Contract Administration	**325 Total**
a. Checking Shop Drawings	25
b. Job Observation	110
c. Installation Scheduling	30
d. Installation (*observation permitted)	40
e. Client and Contractor Meetings	45
f. Punch/Deficiency List	25
g. Site Inspection, Survey and Documentation	50
6. Professional Practice	**285 Total**
a. Office Procedures and Technology	85
b. Resource Library	55
c. Contact with Trade Reps	40
d. Contractual Agreements (*observation permitted)	105

*Denotes modifications made by the Texas Board of Architectural Examiners.

Figure: 22 TAC §75.11(b)

MAXIMUM SANCTIONS TABLE

CATEGORY I. 1st Offense: $1000* 2nd Offense: $1000* 3rd Offense: $1000* *and/or revocation	
Violation	**Reference**
Practicing without a chiropractic license	22 TAC §75.10(d) CA §201.301
Practicing with an expired license (nonrenewal due to default student loan)	22 TAC §73.2(c)(6) and (e) CA §§201.301, 201.351, 201.354(f)
Practicing with an expired license (nonrenewal)	22 TAC §73.2(i) CA §§201.301, 201.351, 201.354(f)
Practicing while on inactive status	22 TAC §73.4(f) CA §§201.301, 201.311(b)(2)
Practicing in non-compliance with continuing education requirements	22 TAC §73.3, §73.5(g) CA §201.301, §201.354(f)
Improper control of patient care and treatment	22 TAC §74.5(c)
Grossly unprofessional conduct	22 TAC §75.1 CA §201.502(a)(7)
Lack of diligence/gross inefficient practice	22 TAC §75.2 CA §201.502(a)(18)
Performing radiologic procedures without registering, with an expired registration, or without DSHS approval; failure to renew (including non-payment of fees)	22 TAC §78.1(a), (d), (h)
MRTCA, DSHS rules or order	22 TAC §78.1(h), (j), (o)
Performing (1) radiologic procedures without supervision, or (2) cineradiography or other restricted procedure	22 TAC §78.1(g), (k), (l), (m)
Permitting a non-registered or non-DSHS approved person to perform radiologic procedures or CRT to perform procedures without supervision	22 TAC §78.1(k), (n)
Delegating to a non-licensee authority to perform adjustments or manipulations	22 TAC §80.1(a)
Failure to supervise a student	22 TAC §80.1(b)
Delegating authority to a licensee whose license has been suspended or revoked	22 TAC §80.1(d)
Failure to comply with the CA, other law or a board order or rule	22 TAC §75.10(c) CA §201.501, §201.502(a)(1)

Failure to comply with down-time restrictions	22 TAC §75.10(f)
Medicaid fraud	CA §201.502(a)(2), (7); HRC §36.002, §36.005
Solicitation	Occ. Code §102.001, §102.006
Default on Student Loan	Occ. Code Chapter 56 22 TAC §80.2
Failure to comply with requirements/restrictions on prepaid treatment plans	22 TAC §80.13
Other statutory violations	CA §201.502(a)(2) - (8), (10), (12) - (17), (19) - (20)
CATEGORY II. 1st Offense: $500 2nd Offense: $750* 3rd Offense: $1000* *and/or suspension	
Violation	**Reference**
Submitting an untrue continuing education certification	22 TAC §73.3(1)(E) CA §201.502(a)(2)
Operating a facility without a certificate of registration or with an expired registration	CA §201.312 22 TAC §§74.2(a), 74.3(e), 74.5(a)
Practicing in a facility without a certificate of registration or with an expired registration	CA §201.312 22 TAC §74.2(k)
Unauthorized disclosure of patient records	22 TAC §80.3 CA §201.402, §201.405
Overtreating/overcharging a patient	22 TAC §75.1(a)(4) HPCA §101.203
Deceptive advertising and other prohibited advertising	22 TAC §77.2 CA §201.502(a)(2), (9), (11); HPCA §101.201
CATEGORY III. 1st Offense: $250 2nd Offense: $500* 3rd Offense: $1000* *and/or suspension	
Violation	**Reference**
Failure to furnish patient records Overcharging for copies of patient records	22 TAC §80.3 CA §201.405(f)
Failure to disclose charges to patient	22 TAC §75.1(a)(6), §77.3(a) HPCA §101.202
Failure to submit to medical examination	22 TAC §80.3(h)
Failure to maintain patient records	22 TAC §80.5

CATEGORY IV. 1st Offense: $250 2nd Offense: $500 3rd Offense: $1000	
Violation	**Reference**
Failure to respond to board inquiries	22 TAC §§73.3(1)(C), 75.3(h), 75.6, 80.3(g)
Failure to display public interest information Displaying an invalid license or renewal card	22 TAC §75.7(d), (e), §75.8 CA §201.502(a)(2), (9)
Failure to complete CRT continuing education	22 TAC §78.1(i)
CATEGORY V. 1st Offense: $250 2nd Offense: $400 3rd Offense: $500	
Violation	Reference
Failure to report change of address	22 TAC §73.1
Failure to report change of facility address/ownership	22 TAC §74.5(d)
Failure to report *locum tenens* information	22 TAC §73.2(b)
Failure to report criminal conviction	22 TAC §75.3(f)
Use of the term "physician," "chiropractic physician"	CA §201.502(a)(22)
Failure to use "chiropractor," "D.C." in advertising	22 TAC §75.1(a)(2)

Figure: 30 TAC §298.225(a)

Bay and Estuary Freshwater Inflow Standards for the Galveston Bay System

Basin	Inflow Quantity (acre-feet per year)	Annual Target Frequency
Trinity	2,816,532	50%
	2,245,644	60%
	1,357,133	75%
San Jacinto	1,460,424	50%
	1,164,408	60%
	703,699	75%

Figure: 30 TAC §298.225(b)(1)

USGS Gage 08049500, West Fork Trinity River near Grand Prairie

Month	Subsistence	Base	Pulse
January	19 cfs	45 cfs	Trigger: 392 cfs Volume: 3,830 af Duration: 4 days
February	19 cfs	45 cfs	Trigger: 392 cfs Volume: 3,830 af Duration: 4 days
March	17 cfs	45 cfs	Trigger: 1,280 cfs Volume: 8,345 af Duration: 8 days
April	17 cfs	45 cfs	Trigger: 1,280 cfs Volume: 8,345 af Duration: 8 days
May	17 cfs	45 cfs	Trigger: 1,280 cfs Volume: 8,345 af Duration: 8 days
June	16 cfs	35 cfs	Trigger: 1,280 cfs Volume: 8,345 af Duration: 8 days
July	16 cfs	35 cfs	Trigger: 293 cfs Volume: 1,899 af Duration: 3 days
August	16 cfs	35 cfs	Trigger: 293 cfs Volume: 1,899 af Duration: 3 days
September	15 cfs	35 cfs	Trigger: 293 cfs Volume: 1,899 af Duration: 3 days
October	15 cfs	35 cfs	N/A
November	15 cfs	35 cfs	N/A
December	19 cfs	45 cfs	Trigger: 392 cfs Volume: 3,830 af Duration: 4 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.225(b)(2)

USGS Gage 08057000, Trinity River at Dallas

Month	Subsistence	Base	Pulse
January	15 cfs	31 cfs	Trigger: 758 cfs Volume: 3,968 af Duration: 3 days
February	15 cfs	31 cfs	Trigger: 758 cfs Volume: 3,968 af Duration: 3 days
March	15 cfs	37 cfs	Trigger: 4,120 cfs Volume: 41,998 af Duration: 9 days
April	15 cfs	37 cfs	Trigger: 4,120 cfs Volume: 41,998 af Duration: 9 days
May	15 cfs	37 cfs	Trigger: 4,120 cfs Volume: 41,998 af Duration: 9 days
June	15 cfs	32 cfs	Trigger: 4,120 cfs Volume: 41,998 af Duration: 9 days
July	15 cfs	32 cfs	Trigger: 660 cfs Volume: 685 af Duration: 3 days
August	15 cfs	32 cfs	Trigger: 660 cfs Volume: 685 af Duration: 3 days
September	15 cfs	26 cfs	Trigger: 660 cfs Volume: 685 af Duration: 3 days
October	15 cfs	26 cfs	N/A
November	15 cfs	26 cfs	N/A
December	15 cfs	31 cfs	Trigger: 758 cfs Volume: 3,968 af Duration: 3 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.225(b)(3)

USGS Gage 08065000, Trinity River near Oakwood

Month	Subsistence	Base	Pulse
January	98 cfs	265 cfs	Trigger: 3,200 cfs Volume: 18,931 af Duration: 5 days
February	98 cfs	265 cfs	Trigger: 3,200 cfs Volume: 18,931 af Duration: 5 days
March	80 cfs	322 cfs	Trigger: 7,840 cfs Volume: 141,705 af Duration: 11 days
April	80 cfs	322 cfs	Trigger: 7,840 cfs Volume: 141,705 af Duration: 11 days
May	80 cfs	322 cfs	Trigger: 7,840 cfs Volume: 141,705 af Duration: 11 days
June	75 cfs	186 cfs	Trigger: 7,840 cfs Volume: 141,705 af Duration: 11 days
July	75 cfs	186 cfs	Trigger: 1,180 cfs Volume: 4,866 af Duration: 2 days
August	75 cfs	186 cfs	Trigger: 1,180 cfs Volume: 4,866 af Duration: 2 days
September	85 cfs	162 cfs	Trigger: 1,180 cfs Volume: 4,866 af Duration: 2 days
October	85 cfs	162 cfs	N/A
November	85 cfs	162 cfs	N/A
December	98 cfs	265 cfs	Trigger: 3,200 cfs Volume: 18,931 af Duration: 5 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.225(b)(4)

USGS Gage 08066500, Trinity River at Romayor

Month	Subsistence	Base	Pulse
January	295 cfs	744 cfs	Trigger: 10,100 cfs Volume: 152,814 af Duration: 13 days
February	295 cfs	744 cfs	Trigger: 10,100 cfs Volume: 152,814 af Duration: 13 days
March	290 cfs	923 cfs	Trigger: 10,900 cfs Volume: 184,186 af Duration: 15 days
April	290 cfs	923 cfs	Trigger: 10,900 cfs Volume: 184,186 af Duration: 15 days
May	290 cfs	923 cfs	Trigger: 10,900 cfs Volume: 184,186 af Duration: 15 days
June	223 cfs	510 cfs	Trigger: 10,900 cfs Volume: 184,186 af Duration: 15 days
July	223 cfs	510 cfs	Trigger: 1,870 cfs Volume: 18,417 af Duration: 7 days
August	223 cfs	510 cfs	Trigger: 1,870 cfs Volume: 18,417 af Duration: 7 days
September	240 cfs	515 cfs	Trigger: 1,870 cfs Volume: 18,417 af Duration: 7 days
October	240 cfs	515 cfs	N/A
November	240 cfs	515 cfs	N/A
December	295 cfs	744 cfs	Trigger: 10,100 cfs Volume: 152,814 af Duration: 13 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.225(b)(5)

USGS Gage 08070000, East Fork San Jacinto River near Cleveland

Month	Subsistence	Base	Pulse
January	10 cfs	27 cfs	Trigger: 475 cfs Volume: 5,055 af Duration: 8 days
February	10 cfs	27 cfs	Trigger: 475 cfs Volume: 5,055 af Duration: 8 days
March	10 cfs	28 cfs	Trigger: 687 cfs Volume: 6,769 af Duration: 8 days
April	10 cfs	28 cfs	Trigger: 687 cfs Volume: 6,769 af Duration: 8 days
May	10 cfs	28 cfs	Trigger: 687 cfs Volume: 6,769 af Duration: 8 days
June	9 cfs	16 cfs	Trigger: 687 cfs Volume: 6,769 af Duration: 8 days
July	9 cfs	16 cfs	Trigger: 94 cfs Volume: 288 af Duration: 2 days
August	9 cfs	16 cfs	Trigger: 94 cfs Volume: 288 af Duration: 2 days
September	9 cfs	16 cfs	Trigger: 94 cfs Volume: 288 af Duration: 2 days
October	9 cfs	16 cfs	Trigger: 56 cfs Volume: 188 af Duration: 2 days
November	9 cfs	16 cfs	Trigger: 56 cfs Volume: 188 af Duration: 2 days
December	10 cfs	27 cfs	Trigger: 475 cfs Volume: 5,055 af Duration: 8 days

cfs = cubic feet per second
af = acre-feet

Figure: 30 TAC §298.225(b)(6)

USGS Gage 08068000, West Fork San Jacinto River near Conroe

Month	Subsistence	Base	Pulse
January	10 cfs	38 cfs	Trigger: 420 cfs Volume: 3,679 af Duration: 7 days
February	10 cfs	38 cfs	Trigger: 420 cfs Volume: 3,679 af Duration: 7 days
March	12 cfs	47 cfs	Trigger: 1,100 cfs Volume: 12,377 af Duration: 9 days
April	12 cfs	47 cfs	Trigger: 1,100 cfs Volume: 12,377 af Duration: 9 days
May	12 cfs	47 cfs	Trigger: 1,100 cfs Volume: 12,377 af Duration: 9 days
June	10 cfs	17 cfs	Trigger: 1,100 cfs Volume: 12,377 af Duration: 9 days
July	10 cfs	17 cfs	Trigger: 74 cfs Volume: 380 af Duration: 2 days
August	10 cfs	17 cfs	Trigger: 74 cfs Volume: 380 af Duration: 2 days
September	10 cfs	16 cfs	Trigger: 74 cfs Volume: 380 af Duration: 2 days
October	10 cfs	16 cfs	N/A
November	10 cfs	16 cfs	N/A
December	10 cfs	38 cfs	Trigger: 420 cfs Volume: 3,679 af Duration: 7 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.270(b)

Reservoirs and Storage Volumes for Calculating Hydrologic Conditions for Measurement Points in the Sabine and Neches River Basins

			END OF SEASON COMBINED STORAGE VOLUME (acre-feet)		
BASIN	MEASUREMENT POINTS	RESERVOIRS	DRY	AVG	WET
NECHES	Neches River at Neches, Texas Angelina River near Alto, Texas	Lake Palestine	less than 181,000	181,000 - 400,400	greater than 400,400
NECHES	Neches River at Rockland, Texas Village Creek near Kountze, Texas Neches River at Evadale, Texas	Lake Palestine and Sam Rayburn Reservoir	less than 2,675,000	2,675,000 - 3,263,400	greater than 3,263,400
SABINE	Sabine River near Gladewater, Texas Big Sandy Creek near Big Sandy, Texas Sabine River near Beckville, Texas	Lake Fork and Lake Tawakoni	less than 1,157,600	1,157,600 - 1,513,800	greater than 1,513,800
SABINE	Sabine River near Bon Weir, Texas Big Cow Creek near Newton, Texas Sabine River near Ruliff, Texas	Lake Fork, Lake Tawakoni, and Toledo Bend Reservoir	less than 4,947,200	4,947,200 - 5,928,900	greater than 5,928,900

Figure: 30 TAC §298.280(1)

USGS Gage 08019500, Big Sandy Creek near Big Sandy

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	20 cfs	66 cfs	N/A	N/A
Winter	Average	N/A	106 cfs	2 per season Trigger: 358 cfs Volume: 5,932 af Duration: 10 days	N/A
Winter	Wet	N/A	163 cfs	2 per season Trigger: 358 cfs Volume: 5,932 af Duration: 10 days	1 per season Trigger: 942 cfs Volume: 14,544 af Duration: 16 days
Spring	Dry	9 cfs	30 cfs	1 per season Trigger: 313 cfs Volume: 5,062 af Duration: 13 days	N/A
Spring	Average	N/A	51 cfs	2 per season Trigger: 313 cfs Volume: 5,062 af Duration: 13 days	N/A
Spring	Wet	N/A	111 cfs	2 per season Trigger: 313 cfs Volume: 5,062 af Duration: 13 days	1 per season Trigger: 950 cfs Volume: 12,852 af Duration: 19 days
Summer	Dry	8 cfs	14 cfs	1 per season Trigger: 50 cfs Volume: 671 af Duration: 6 days	N/A
Summer	Average	N/A	18 cfs	2 per season Trigger: 50 cfs Volume: 671 af Duration: 6 days	N/A
Summer	Wet	N/A	26 cfs	2 per season Trigger: 50 cfs Volume: 671 af Duration: 6 days	1 per season Trigger: 132 cfs Volume: 2,054 af Duration: 11 days
Fall	Dry	8 cfs	20 cfs	N/A	N/A
Fall	Average	N/A	36 cfs	2 per season Trigger: 130 cfs Volume: 2,189 af Duration: 9 days	N/A
Fall	Wet	N/A	63 cfs	2 per season Trigger: 130 cfs Volume: 2,189 af Duration: 9 days	1 per season Trigger: 367 cfs Volume: 6,055 af Duration: 14 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(2)

USGS Gage 08020000, Sabine River near Gladewater

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	45 cfs	277 cfs	N/A	N/A
Winter	Average	N/A	472 cfs	2 per season Trigger: 1,880 cfs Volume: 48,599 af Duration: 15 days	N/A
Winter	Wet	N/A	836 cfs	2 per season Trigger: 1,880 cfs Volume: 48,599 af Duration: 15 days	1 per season Trigger: 5,570 cfs Volume: 194,743 af Duration: 24 days
Spring	Dry	22 cfs	119 cfs	1 per season Trigger: 1,580 cfs Volume: 51,150 af Duration: 16 days	N/A
Spring	Average	N/A	283 cfs	2 per season Trigger: 1,580 cfs Volume: 51,150 af Duration: 16 days	N/A
Spring	Wet	N/A	664 cfs	2 per season Trigger: 1,580 cfs Volume: 51,150 af Duration: 16 days	1 per season Trigger: 5,070 cfs Volume: 140,612 af Duration: 25 days
Summer	Dry	14 cfs	34 cfs	1 per season Trigger: 168 cfs Volume: 2,752 af Duration: 7 days	N/A
Summer	Average	N/A	46 cfs	2 per season Trigger: 168 cfs Volume: 2,752 af Duration: 7 days	N/A
Summer	Wet	N/A	78 cfs	2 per season Trigger: 168 cfs Volume: 2,752 af Duration: 7 days	1 per season Trigger: 730 cfs Volume: 13,480 af Duration: 17 days
Fall	Dry	17 cfs	49 cfs	N/A	N/A
Fall	Average	N/A	105 cfs	2 per season Trigger: 380 cfs Volume: 1,098 af Duration: 11 days	N/A
Fall	Wet	N/A	232 cfs	2 per season Trigger: 380 cfs Volume: 1,098 af Duration: 11 days	1 per season Trigger: 2,240 cfs Volume: 66,875 af Duration: 21 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(3)

USGS Gage 08022040, Sabine River near Beckville

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	66 cfs	438 cfs	N/A	N/A
Winter	Average	N/A	807 cfs	2 per season Trigger: 2,900 cfs Volume: 84,998 af Duration: 15 days	N/A
Winter	Wet	N/A	1,580 cfs	2 per season Trigger: 2,900 cfs Volume: 84,998 af Duration: 15 days	1 per season Trigger: 7,200 cfs Volume: 302,174 af Duration: 24 days
Spring	Dry	28 cfs	232 cfs	1 per season Trigger: 2,160 cfs Volume: 72,092 af Duration: 15 days	N/A
Spring	Average	N/A	526 cfs	2 per season Trigger: 2,160 cfs Volume: 72,092 af Duration: 15 days	N/A
Spring	Wet	N/A	1,260 cfs	2 per season Trigger: 2,160 cfs Volume: 72,092 af Duration: 15 days	1 per season Trigger: 7,030 cfs Volume: 220,513 af Duration: 27 days
Summer	Dry	22 cfs	51 cfs	1 per season Trigger: 285 cfs Volume: 5,436 af Duration: 6 days	N/A
Summer	Average	N/A	74 cfs	2 per season Trigger: 285 cfs Volume: 5,436 af Duration: 6 days	N/A
Summer	Wet	N/A	122 cfs	2 per season Trigger: 285 cfs Volume: 5,436 af Duration: 6 days	1 per season Trigger: 1,120 cfs Volume: 19,863 af Duration: 16 days
Fall	Dry	22 cfs	75 cfs	N/A	N/A
Fall	Average	N/A	141 cfs	2 per season Trigger: 628 cfs Volume: 7,245 af Duration: 9 days	N/A
Fall	Wet	N/A	356 cfs	2 per season Trigger: 628 cfs Volume: 7,245 af Duration: 9 days	1 per season Trigger: 3,250 cfs Volume: 100,717 af Duration: 21 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(4)

USGS Gage 08028500, Sabine River near Bon Weir

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	479 cfs	1,460 cfs	N/A	N/A
Winter	Average	N/A	5,870 cfs	2 per season Trigger: 13,800 cfs Volume: 421,966 af Duration: 14 days	N/A
Winter	Wet	N/A	15,400 cfs	2 per season Trigger: 13,800 cfs Volume: 421,966 af Duration: 14 days	1 per season Trigger: 20,600 cfs Volume: 690,800 af Duration: 17 days
Spring	Dry	279 cfs	857 cfs	1 per season Trigger: 6,700 cfs Volume: 151,163 af Duration: 12 days	N/A
Spring	Average	N/A	1,590 cfs	2 per season Trigger: 6,700 cfs Volume: 151,163 af Duration: 12 days	N/A
Spring	Wet	N/A	6,680 cfs	2 per season Trigger: 6,700 cfs Volume: 151,163 af Duration: 12 days	1 per season Trigger: 16,500 cfs Volume: 483,992 af Duration: 21 days
Summer	Dry	241 cfs	478 cfs	1 per season Trigger: 5,880 cfs Volume: 132,571 af Duration: 13 days	N/A
Summer	Average	N/A	656 cfs	2 per season Trigger: 5,880 cfs Volume: 132,571 af Duration: 13 days	N/A
Summer	Wet	N/A	1,120 cfs	2 per season Trigger: 5,880 cfs Volume: 132,571 af Duration: 13 days	1 per season Trigger: 7,360 cfs Volume: 175,009 af Duration: 14 days
Fall	Dry	241 cfs	478 cfs	N/A	N/A
Fall	Average	N/A	615 cfs	2 per season Trigger: 2,590 cfs Volume: 40,957 af Duration: 7 days	N/A
Fall	Wet	N/A	1,110 cfs	2 per season Trigger: 2,590 cfs Volume: 40,957 af Duration: 7 days	1 per season Trigger: 8,960 cfs Volume: 249,617 af Duration: 17 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(5)

USGS Gage 08029500, Big Cow Creek near Newton

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	28 cfs	56 cfs	N/A	N/A
Winter	Average	N/A	78 cfs	2 per season Trigger: 693 cfs Volume: 4,911 af Duration: 8 days	N/A
Winter	Wet	N/A	106 cfs	2 per season Trigger: 693 cfs Volume: 4,911 af Duration: 8 days	1 per season Trigger: 1,080 cfs Volume: 7,387 af Duration: 10 days
Spring	Dry	20 cfs	38 cfs	1 per season Trigger: 350 cfs Volume: 2,545 af Duration: 7 days	N/A
Spring	Average	N/A	52 cfs	2 per season Trigger: 350 cfs Volume: 2,545 af Duration: 7 days	N/A
Spring	Wet	N/A	74 cfs	2 per season Trigger: 350 cfs Volume: 2,545 af Duration: 7 days	1 per season Trigger: 862 cfs Volume: 6,075 af Duration: 10 days
Summer	Dry	20 cfs	28 cfs	1 per season Trigger: 109 cfs Volume: 873 af Duration: 5 days	N/A
Summer	Average	N/A	36 cfs	2 per season Trigger: 109 cfs Volume: 873 af Duration: 5 days	N/A
Summer	Wet	N/A	48 cfs	2 per season Trigger: 109 cfs Volume: 873 af Duration: 5 days	1 per season Trigger: 191 cfs Volume: 1,447 af Duration: 7 days
Fall	Dry	20 cfs	36 cfs	N/A	N/A
Fall	Average	N/A	46 cfs	2 per season Trigger: 322 cfs Volume: 2,232 af Duration: 7 days	N/A
Fall	Wet	N/A	64 cfs	2 per season Trigger: 322 cfs Volume: 2,232 af Duration: 7 days	1 per season Trigger: 790 cfs Volume: 5,038 af Duration: 9 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(6)

USGS Gage 08030500, Sabine River near Ruliff

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	949 cfs	1,520 cfs	N/A	N/A
Winter	Average	N/A	2,565 cfs	2 per season Trigger: 1,600 cfs Volume: 10,202 af Duration: 3 days	N/A
Winter	Wet	N/A	5,063 cfs	2 per season Trigger: 1,600 cfs Volume: 10,202 af Duration: 3 days	1 per season Trigger: 9,880 cfs Volume: 261,464 af Duration: 22 days
Spring	Dry	436 cfs	1,208 cfs	1 per season Trigger: 3,250 cfs Volume: 42,883 af Duration: 8 days	N/A
Spring	Average	N/A	1,795 cfs	2 per season Trigger: 3,250 cfs Volume: 42,883 af Duration: 8 days	N/A
Spring	Wet	N/A	3,035 cfs	2 per season Trigger: 3,250 cfs Volume: 42,883 af Duration: 8 days	1 per season Trigger: 9,880 cfs Volume: 253,851 af Duration: 21 days
Summer	Dry	396 cfs	670 cfs	1 per season Trigger: 3,380 cfs Volume: 54,321 af Duration: 11 days	N/A
Summer	Average	N/A	870 cfs	2 per season Trigger: 3,380 cfs Volume: 54,321 af Duration: 11 days	N/A
Summer	Wet	N/A	1,430 cfs	2 per season Trigger: 3,380 cfs Volume: 54,321 af Duration: 11 days	1 per season Trigger: 6,600 cfs Volume: 157,936 af Duration: 19 days
Fall	Dry	396 cfs	735 cfs	N/A	N/A
Fall	Average	N/A	970 cfs	2 per season Trigger: 2,020 cfs Volume: 17,662 af Duration: 5 days	N/A
Fall	Wet	N/A	1,400 cfs	2 per season Trigger: 2,020 cfs Volume: 17,662 af Duration: 5 days	1 per season Trigger: 6,030 cfs Volume: 110,471 af Duration: 15 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(7)

USGS Gage 08032000, Neches River at Neches

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	51 cfs	178 cfs	N/A	N/A
Winter	Average	N/A	408 cfs	2 per season Trigger: 833 cfs Volume: 19,104 af Duration: 10 days	N/A
Winter	Wet	N/A	814 cfs	2 per season Trigger: 833 cfs Volume: 19,104 af Duration: 10 days	1 per season Trigger: 1,370 cfs Volume: 39,549 af Duration: 13 days
Spring	Dry	21 cfs	87 cfs	1 per season Trigger: 820 cfs Volume: 20,405 af Duration: 12 days	N/A
Spring	Average	N/A	194 cfs	2 per season Trigger: 820 cfs Volume: 20,405 af Duration: 12 days	N/A
Spring	Wet	N/A	524 cfs	2 per season Trigger: 820 cfs Volume: 20,405 af Duration: 12 days	1 per season Trigger: 1,370 cfs Volume: 31,846 af Duration: 15 days
Summer	Dry	12 cfs	42 cfs	1 per season Trigger: 113 cfs Volume: 1,339 af Duration: 4 days	N/A
Summer	Average	N/A	73 cfs	2 per season Trigger: 113 cfs Volume: 1,339 af Duration: 4 days	N/A
Summer	Wet	N/A	108 cfs	2 per season Trigger: 113 cfs Volume: 1,339 af Duration: 4 days	1 per season Trigger: 248 cfs Volume: 4,029 af Duration: 7 days
Fall	Dry	13 cfs	73 cfs	N/A	N/A
Fall	Average	N/A	104 cfs	2 per season Trigger: 345 cfs Volume: 5,391 af Duration: 8 days	N/A
Fall	Wet	N/A	172 cfs	2 per season Trigger: 345 cfs Volume: 5,391 af Duration: 8 days	1 per season Trigger: 782 cfs Volume: 19,996 af Duration: 12 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(8)

USGS Gage 08033500, Neches River at Rockland

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	67 cfs	548 cfs	N/A	N/A
Winter	Average	N/A	1,390 cfs	2 per season Trigger: 3,080 cfs Volume: 82,195 af Duration: 14 days	N/A
Winter	Wet	N/A	2,500 cfs	2 per season Trigger: 3,080 cfs Volume: 82,195 af Duration: 14 days	1 per season Trigger: 6,910 cfs Volume: 256,523 af Duration: 22 days
Spring	Dry	29 cfs	382 cfs	1 per season Trigger: 1,720 cfs Volume: 39,935 af Duration: 12 days	N/A
Spring	Average	N/A	1,020 cfs	2 per season Trigger: 1,720 cfs Volume: 39,935 af Duration: 12 days	N/A
Spring	Wet	N/A	2,160 cfs	2 per season Trigger: 1,720 cfs Volume: 39,935 af Duration: 12 days	1 per season Trigger: 5,600 cfs Volume: 167,866 af Duration: 23 days
Summer	Dry	21 cfs	61 cfs	1 per season Trigger: 195 cfs Volume: 1,548 af Duration: 5 days	N/A
Summer	Average	N/A	88 cfs	2 per season Trigger: 195 cfs Volume: 1,548 af Duration: 5 days	N/A
Summer	Wet	N/A	151 cfs	2 per season Trigger: 195 cfs Volume: 1,548 af Duration: 5 days	1 per season Trigger: 615 cfs Volume: 13,365 af Duration: 11 days
Fall	Dry	21 cfs	82 cfs	N/A	N/A
Fall	Average	N/A	168 cfs	2 per season Trigger: 515 cfs Volume: 649 af Duration: 8 days	N/A
Fall	Wet	N/A	381 cfs	2 per season Trigger: 515 cfs Volume: 649 af Duration: 8 days	1 per season Trigger: 2,240 cfs Volume: 72,600 af Duration: 17 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(9)

USGS Gage 08036500, Angelina River near Alto

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	55 cfs	252 cfs	N/A	N/A
Winter	Average	N/A	581 cfs	2 per season Trigger: 1,620 cfs Volume: 37,114 af Duration: 13 days	N/A
Winter	Wet	N/A	971 cfs	2 per season Trigger: 1,620 cfs Volume: 37,114 af Duration: 13 days	1 per season Trigger: 3,530 cfs Volume: 89,332 af Duration: 18 days
Spring	Dry	18 cfs	82 cfs	1 per season Trigger: 1,100 cfs Volume: 24,117 af Duration: 14 days	N/A
Spring	Average	N/A	206 cfs	2 per season Trigger: 1,100 cfs Volume: 24,117 af Duration: 14 days	N/A
Spring	Wet	N/A	518 cfs	2 per season Trigger: 1,100 cfs Volume: 24,117 af Duration: 14 days	1 per season Trigger: 2,760 cfs Volume: 59,278 af Duration: 20 days
Summer	Dry	11 cfs	36 cfs	1 per season Trigger: 146 cfs Volume: 2,632 af Duration: 8 days	N/A
Summer	Average	N/A	48 cfs	2 per season Trigger: 146 cfs Volume: 2,632 af Duration: 8 days	N/A
Summer	Wet	N/A	69 cfs	2 per season Trigger: 146 cfs Volume: 2,632 af Duration: 8 days	1 per season Trigger: 397 cfs Volume: 7,129 af Duration: 13 days
Fall	Dry	16 cfs	47 cfs	N/A	N/A
Fall	Average	N/A	92 cfs	2 per season Trigger: 588 cfs Volume: 12,038 af Duration: 12 days	N/A
Fall	Wet	N/A	176 cfs	2 per season Trigger: 588 cfs Volume: 12,038 af Duration: 12 days	1 per season Trigger: 1,500 cfs Volume: 34,291 af Duration: 16 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(10)

USGS Gage 08041000, Neches River at Evadale

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	228 cfs	1,750 cfs	N/A	N/A
Winter	Average	N/A	2,635 cfs	2 per season Trigger: 2,020 cfs Volume: 20, 920 af Duration: 6 days	N/A
Winter	Wet	N/A	4,988 cfs	2 per season Trigger: 2,020 cfs Volume: 20, 920 af Duration: 6 days	1 per season Trigger: 8,700 cfs Volume: 246,099 af Duration: 22 days
Spring	Dry	266 cfs	1,640 cfs	1 per season Trigger: 3,830 cfs Volume: 68,784 af Duration: 12 days	N/A
Spring	Average	N/A	3,210 cfs	2 per season Trigger: 3,830 cfs Volume: 68,784 af Duration: 12 days	N/A
Spring	Wet	N/A	3,960 cfs	2 per season Trigger: 3,830 cfs Volume: 68,784 af Duration: 12 days	1 per season Trigger: 8,700 cfs Volume: 246,099 af Duration: 22 days
Summer	Dry	228 cfs	527 cfs	1 per season Trigger: 1,540 cfs Volume: 21,605 af Duration: 9 days	N/A
Summer	Average	N/A	2,250 cfs	2 per season Trigger: 1,540 cfs Volume: 21,605 af Duration: 9 days	N/A
Summer	Wet	N/A	3,230 cfs	2 per season Trigger: 1,540 cfs Volume: 21,605 af Duration: 9 days	1 per season Trigger: 3,680 cfs Volume: 69,561 af Duration: 13 days
Fall	Dry	228 cfs	465 cfs	N/A	N/A
Fall	Average	N/A	1,570 cfs	2 per season Trigger: 1,570 cfs Volume: 17,815 af Duration: 7 days	N/A
Fall	Wet	N/A	2,730 cfs	2 per season Trigger: 1,570 cfs Volume: 17,815 af Duration: 7 days	1 per season Trigger: 4,160 cfs Volume: 71,531 af Duration: 13 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 30 TAC §298.280(11)

USGS Gage 08041500, Village Creek near Kountze

Season	Condition	Subsistence	Base	Small Pulse	Large Pulse
Winter	Dry	83 cfs	240 cfs	N/A	N/A
Winter	Average	N/A	424 cfs	2 per season Trigger: 2,010 cfs Volume: 36,927 af Duration: 13 days	N/A
Winter	Wet	N/A	672 cfs	2 per season Trigger: 2,010 cfs Volume: 36,927 af Duration: 13 days	1 per season Trigger: 2,070 cfs Volume: 38,134 af Duration: 13 days
Spring	Dry	49 cfs	106 cfs	1 per season Trigger: 1,380 cfs Volume: 23,093 af Duration: 13 days	N/A
Spring	Average	N/A	189 cfs	2 per season Trigger: 1,380 cfs Volume: 23,093 af Duration: 13 days	N/A
Spring	Wet	N/A	335 cfs	2 per season Trigger: 1,380 cfs Volume: 23,093 af Duration: 13 days	1 per season Trigger: 2,070 cfs Volume: 31,650 af Duration: 15 days
Summer	Dry	41 cfs	70 cfs	1 per season Trigger: 341 cfs Volume: 6,159 af Duration: 8 days	N/A
Summer	Average	N/A	91 cfs	2 per season Trigger: 341 cfs Volume: 6,159 af Duration: 8 days	N/A
Summer	Wet	N/A	135 cfs	2 per season Trigger: 341 cfs Volume: 6,159 af Duration: 8 days	1 per season Trigger: 814 cfs Volume: 11,418 af Duration: 13 days
Fall	Dry	41 cfs	89 cfs	N/A	N/A
Fall	Average	N/A	138 cfs	2 per season Trigger: 712 cfs Volume: 11,426 af Duration: 9 days	N/A
Fall	Wet	N/A	236 cfs	2 per season Trigger: 712 cfs Volume: 11,426 af Duration: 9 days	1 per season Trigger: 2,070 cfs Volume: 31,143 af Duration: 13 days

cfs = cubic feet per second
af = acre-feet
N/A = not applicable

Figure: 34 TAC §9.4308(f)

(1) Ground for Objection Number: 1
Category: A
Property Identification Number: 1234
Inaccurate Finding: inclusion of sale
Inaccuracy of Finding: the sale was a sale between relatives that does not represent market value
Accurate Finding/Change Sought by Protest: delete sale
Basis for Claim of Inaccuracy: letter from seller stating that she is the mother of the buyer and sold the property for far less than the amount for which similar houses in her neighborhood had sold
Documentary Evidence Supporting Allegation of Inaccuracy: letter from seller

(2) Ground for Objection Number: 2
Category: A
Property Identification Number 1234
Inaccurate Finding: sales price
Inaccuracy of Finding: sales price was not adjusted to account for personal property that was included in the sale
Accurate Finding/Change Sought by Protest: adjust sale to deduct $1435 for value of 2001 Kawasaki JS750-C4 SXi Pro included in sale
Basis for Claim of Inaccuracy: MLS report indicating personal property was included in sale and printout of Kelley Blue Book online report of trade-in value for 2001 Kawasaki JS750-C4 SXi Pro
Documentary Evidence Supporting Allegation of Inaccuracy: MLS report and Kelley Blue Book printout

(3) Ground for Objection Number: 3
Category: D1
Land Class: Dry Corn
Item of Income or Expense: 2006 fertilizer expense
Inaccurate Finding: 2006 fertilizer expense
Inaccuracy of Finding: 2006 fertilizer expense of $61.50 per acre is too low
Accurate Finding/Change Sought by Protest: increase 2006 fertilizer expense to $62.72 per acre
Basis for Claim of Inaccuracy: applicable county surveys received by the appraisal district reflect an average 2006 fertilizer expense of $62.72 per acre
Documentary Evidence Supporting Allegation of Inaccuracy: applicable county surveys received by the appraisal district

(4) Ground for Objection Number: 4
Category: J
Company Identification Number: 123456
Inaccurate Finding: projected NOI
Inaccuracy of Finding: projected NOI of $100,000,000 is too high
Accurate Finding/Change Sought by Protest: projected NOI should be lowered to $85,000,000
Basis for Claim of Inaccuracy: company's history of income as reflected in company's FERC forms supports a projected NOI of $85,000,000
Documentary Evidence Supporting Allegation of Inaccuracy: company's FERC forms

(5) Ground for Objection Number: 5
Category: SR
Property Identification Number: N/A
Inaccurate Finding: homestead exemption total
Inaccuracy of Finding: homestead exemption totals require correction from last self report
Accurate Finding/Change Sought by Protest: correct homestead exemption total
Basis for Claim of Inaccuracy: self report provided to comptroller was incorrect
Documentary Evidence Supporting Allegation of Inaccuracy: amended self report

Figure: 40 TAC §745.693(a)

Type of Criminal Conviction	Is This Person Eligible for a Risk Evaluation?	If This Person Is Eligible for a Risk Evaluation, May the Person be Present at a Child-Care Operation While Children are in Care Pending the Outcome of the Risk Evaluation?
(1) A felony conviction of an offense under Title 5, Title 6, Chapter 29 of Title 7, Chapter 43 or §42.072 of Title 9, §15.031 of Title 4, or §38.17 of Title 8 of the Texas Penal Code (TPC), or any like offense under the law of another state or federal law.	No, this person is permanently barred from being present at a child-care operation while children are in care.	Not applicable, because this person is not eligible for a risk evaluation.
(2) A misdemeanor conviction of an offense under Title 5, Title 6, Chapter 29 of Title 7, Chapter 43 or §42.072 of Title 9, §15.031 of Title 4, or §38.17 of Title 8 of the TPC, or any like offense under the law of another state or federal law.	No, for listed family homes and registered child-care homes this person is permanently barred from being present in the family home while children are in care. Yes, for all other types of child-care operations this person is eligible for a risk evaluation.	Not applicable for listed family homes and registered child-care homes, because this person is not eligible for a risk evaluation. Yes, for all other types of child-care operations, if we previously gave written approval for the person to remain at the operation with the same conviction in question.
(3) A felony or misdemeanor conviction committed within the last 10 years of an offense under the Texas Controlled Substances Act; the TPC, §§39.04, 42.08, 42.09, 42.091, 42.092, 42.10, 46.13, or Chapter 49; the Texas Alcoholic Beverage Code, §106.06; or any like offense of the law of another state or federal law.	Yes, unless a foster or adoptive applicant has a felony conviction within the last five years for a drug-related offense; in that circumstance, federal law prohibits approval of a foster or adoptive home. 42 U.S.C. §671(a)(20)(A)(ii)	No, if it's a felony conviction, unless we previously gave written approval for the person to remain in the operation with the same conviction in question. Yes, if it's a misdemeanor conviction.
(4) A felony conviction of an offense under any other title of the TPC, or any like offense under the law of another state or federal law that the person committed within the past ten years.	Yes	Yes, if we previously gave written approval for the person to remain in the operation with the same conviction in question.

(5) Any deferred adjudication of crimes listed above and the person has not completed probation.	Yes, for all offenses listed above that do not bar a person from being present in the operation while children are in care. No, for offenses listed above that bar a person from being present in an operation while children are in care.	Yes, for all offenses listed above that do not bar a person from being present in the operation while children are in care. No, for offenses listed above that bar a person from being present in an operation while children are in care.

Figure: 40 TAC §747.3105(a)

Food Groups	Number of Servings to Meet 1/3 Daily Needs	Number of Servings to Meet 1/2 Daily Needs	Serving Size
Milk	1 and 1/3	2	4 oz. Milk or 1/2 oz. Cheese or 4 oz. Yogurt
Meat/Meat Alternative	1	1 and 1/2	1/2 -1 oz. Cooked lean meat or 1/2 - 1 Egg or 1/4 c. Cooked beans
Vegetables and Fruit	1 and 1/3 +	2 +	2-3 Tb. Cooked vegetables or 2-3 Tb. Canned fruit or 1/4 Small fresh fruit or 1/4 - 1/2 c. Juice
Whole Grains	1 and 1/3 +	2 +	1/2 Slice bread or 1/4 c. Cooked cereal or 1/4 c. Pasta or rice or 1 or 2 Crackers

Figure: 40 TAC §747.3105(b)

Food Groups	Number of Servings to Meet 1/3 Daily Requirement	Number of Servings to Meet 1/2 Daily Requirement	Serving Size
Milk	2/3 of One Serving	1	3/4 c. 1% Milk or 1 & 1/2 oz. Cheese or 3/4 c. Yogurt
Meat/Meat Alternative	2/3 of One Serving	1	1 & 1/2 oz. Lean cooked meat or 3/4 Egg or 1/4 c. Cooked beans
Vegetable	1	1 and 1/2	1/2 c. Raw or cooked vegetable or 1/2 c. Raw leafy vegetable
Fruit	2/3 of One Serving	1	1/2 c. Canned or chopped fruit or 1 Piece fruit or melon wedge or 1/2 c. Juice
Whole Grains	2	3	1/2 Slice bread or 1/4 c. Cooked cereal 1/2 oz. Ready to eat cereal or 1/4 c. Cooked pasta or rice or 3 - 5 Crackers

Figure: 40 TAC §747.3105(c)

Food Groups	Number of Servings to Meet 1/3 Daily Requirement	Number of Servings to Meet 1/2 Daily Requirement	Serving Size
Milk	2/3 to 1	1 to 1 and 1/2	1c. 1% Milk or 1& 1/2 oz. Natural cheese or 2 oz. Processed cheese or 1 c. Yogurt
Meat/Meat Alternative	2/3 to 1	1	2 oz. Cooked lean meat, poultry, or fish or 1/2 c. Cooked beans or 1/2 c. Tofu or 2 Tb. Peanut butter
Vegetables	1 to 1 and 2/3	2	1/2 c. Raw or cooked vegetables or 1/2 c. Raw leafy vegetable
Fruit	2/3 to 1 and 1/3	1 to 2	1/2 c. Canned or chopped fruit or 1 Medium piece fruit or 3/4 c. Juice
Whole Grains	2 to 3 and 2/3	3 to 5+	1 Slice bread or 1/2 c. Cooked cereal or 3/4 oz. Ready to eat cereal or 1/2 c. Cooked pasta or rice or 4-6 Crackers

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Notice of Proposed Settlement of Environmental Claims - Tronox Incorporated

The State of Texas hereby gives notice of the proposed resolution of the Texas Commission on Environmental Quality's (TCEQ) claims in the Tronox Incorporated bankruptcy case now pending in the United States Bankruptcy Court for the Southern District of New York. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the law.

Case Title and Court: *In re Tronox Incorporated, et al.*, Case No. 09-10156 (ALG), United States Bankruptcy Court for the Southern District of New York.

Nature of Claims: TCEQ's proofs of claim in the bankruptcy case set forth claims and causes of action under environmental laws and pursuant to Tronox's status as the present owner of certain properties in Texas.

Proposed Settlement: The proposed settlement provides for the transfer of environmentally contaminated sites in Beaumont, Texarkana and Corpus Christi to a national custodial trust which will have approximately $4,400,000.00 allocated to these sites to fund critical systems for the next 8-10 years while a pending suit against Tronox's former parent for, *inter alia*, fraudulent transfers is being prosecuted. Approximately 31 former service stations will also be transferred to the custodial trust. The tanks have been removed and there is no known environmental contamination at 15 of the former service stations. TCEQ is not aware of any environmental contamination at the remaining 16 sites. A contingency fund for the service stations will be separately funded.

The Office of the Attorney General will accept written comments relating to this proposed judgment for thirty (30) days from the date of the publication of this notice. Copies of the proposed settlement may be examined at the Office of the Attorney General, 300 W. 15th Street, 8th Floor, Austin, Texas. A copy of the proposed settlement may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the settlement and written comments on the proposed settlement should be directed to J. Casey Roy, Assistant Attorney General, Bankruptcy & Collections Division, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 475-4555, facsimile (512) 482-8341.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201006480
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: November 9, 2010

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Notice of Settlement of a Texas Water Code Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code. Before the State may settle a judicial enforcement action, pursuant to the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: Settlement Agreement in *State of Texas v. Sonal Enterprises, Inc., d/b/a Stop-N-Joy;* Cause No. D-1-GV-08-002782 in the 126th Judicial District, Travis County District Court.

Background: This suit alleges violations of the rules promulgated by the Texas Commission on Environmental Quality under the Texas Water Code related to the use of underground storage tanks. The Defendant is Sonal Enterprises, Inc. The suit seeks recovery of costs expended by the Texas Commission on Environmental Quality in response to a release of gasoline from underground storage tanks, civil penalties, injunctive relief, attorney's fees, and court costs.

Nature of the Settlement: The settlement awards $83,400.00 in civil penalties, $115,454.47 in corrective action costs, $49,549.00 in prejudgment interest, and $31,800.00 in attorney's fees and court costs for the State. The Judgment also requires the Defendant to complete a site assessment and perform further corrective action.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement should be directed to Mark Steinbach, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201006406
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: November 8, 2010

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Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil - October 2010

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period October 2010, as required by Tax Code, §202.058, is $61.37 per barrel for the three-month

period beginning on July 1, 2010, and ending September 30, 2010. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of October 2010, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period October 2010, as required by Tax Code, §201.059, is $3.34 per mcf for the three-month period beginning on July 1, 2010, and ending September 30, 2010. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of October 2010, from a qualified Low-Producing Well, is eligible for 25% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-201006492
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: November 10, 2010

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 11/15/10 - 11/21/10 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 11/15/10 - 11/21/10 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-201006447
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: November 9, 2010

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **December 20, 2010.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on December 20, 2010.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: ALMEDA MART, INC.; DOCKET NUMBER: 2010-1161-PST-E; IDENTIFIER: RN102369261; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §115.246(4) and (6) and Texas Health and Safe (THSC), §382.085(b), by failing to maintain Stage II records at the station; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $4,369; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Chevron Phillips Chemical Company, LP; DOCKET NUMBER: 2010-1151-AIR-E; IDENTIFIER: RN100825249; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.715(a), New Source Review (NSR) Permit Number 22690, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $23,250; Supplemental Environmental Project (SEP) offset amount of $9,300 applied to Brazoria County - Brazoria County Vehicle and Equipment Program; ENFORCEMENT COORDINATOR: Alison Fischer, (512) 239-2574; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: City of Cockrell Hill; DOCKET NUMBER: 2010-0982-PWS-E; IDENTIFIER: RN101185320; LOCATION: Dallas County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.109(f)(3) and §290.122(b)(2)(A) and THSC, §382.085(b), by failing to comply with the maximum contaminant level (MCL) for total coliform and by failing to provide public notice for exceeding the MCL for total coliform; PENALTY: $2,430; SEP offset amount of $2,430 applied to Keep Texas Beautiful - Stop Trashing Texas Program; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Combined Relocation Services, Inc. dba Matt Patterson Custom Homes; DOCKET NUMBER: 2010-1464-WQ-E; IDENTIFIER: RN105974653; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: residential construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $750; ENFORCEMENT COORDINATOR: Martha Hott, (512) 239-2587; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Conroe Independent School District; DOCKET NUMBER: 2010-1207-MWD-E; IDENTIFIER: RN102336716; LOCATION: Conroe, Montgomery County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013690001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with the permitted effluent limitations for total suspended solids (TSS); and 30 TAC §305.125(17) and TPDES Permit Number WQ0013690001, Sludge Provisions, by failing to timely submit the annual sludge report; PENALTY: $3,255; ENFORCEMENT COORDINATOR: JR Cao, (512) 239-2543; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2010-0985-AIR-E; IDENTIFIER: RN102553369; LOCATION: Ozona, Crockett County; TYPE OF FACILITY: natural gas plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain authorization for the 400 barrel (bbl) gunbarrel tank; 30 TAC §122.122(b) and THSC, §382.085(b), by failing to accurately represent the gunbarrel tank and tank numbers 1 and 4 in Federal Operating Permit (FOP) Number O-2542; and 30 TAC §116.115(c) and §116.116(a) and (b), NSR Permit Number 18643, SC Number 5, and THSC, §382.085(b), by failing to install a vapor recovery unit; PENALTY: $363,829; SEP offset amount of $145,532 applied to Texas Parent Teacher Association (PTA) - *Clean School Bus Program;* ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(7) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2010-1358-AIR-E; IDENTIFIER: RN100220052; LOCATION: Stinnett, Moore County; TYPE OF FACILITY: natural gas compression station; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b), by failing to obtain permit authorization for fugitive emissions from the compression and processing equipment; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(8) COMPANY: City of Del Rio; DOCKET NUMBER: 2010-1028-MLM-E; IDENTIFIER: RN101608925; LOCATION: Val Verde County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(5) and TPDES Permit Number WQ0010159003, Operational Requirements Number 1, by failing to properly operate and maintain all facilities and systems of treatment and control; and 30 TAC §330.9(g)(2) and §330.15(c), by failing to obtain authorization as a municipal solid waste (MSW) Type V facility prior to processing grease trap waste; PENALTY: $2,905; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(9) COMPANY: Diamond Gulf, Inc. dba Almeda Food Store; DOCKET NUMBER: 2010-1178-PST-E; IDENTIFIER: RN101764694; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $3,646; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: Formosa Plastics Corporation, Texas; DOCKET NUMBER: 2010-1112-IHW-E; IDENTIFIER: RN100218973; LOCATION: Point Comfort, Calhoun County; TYPE OF FACILITY: chemical manufacturing; RULE VIOLATED: 30 TAC §335.4, by failing to prevent the storage of industrial solid waste (ISW) in such a manner that would cause the discharge or imminent threat of discharge of ISW into or adjacent to waters in the state; 30 TAC §335.6(c), by failing to provide written notification for all waste management units; and 30 TAC §335.69(a)(1)(B) and §335.112(a)(9) and 40 CFR §§262.34(a)(1)(ii), 262.190, 265.191, 265.193, 265.194, and 265.195(a) - (c) and (g), by failing to comply with the requirements of 40 CFR Part 265, Subpart J, for tanks storing or treating hazardous waste; PENALTY: $67,675; SEP offset amount of $27,070 applied to National Audubon Society - *Sundown Island Sanctuary Anti-erosion, Re-vegetation and Pest Control Project;* ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(11) COMPANY: Harris County Water Control and Improvement District No. 119; DOCKET NUMBER: 2010-1066-PWS-E; IDENTIFIER: RN101406999; LOCATION: Spring, Harris County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(iv) and THSC, §341.0315(c), by failing to provide an elevated storage capacity of 100 gallons per connection; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: H. E. BUTT GROCERY COMPANY and HEB Grocery Company, LP; DOCKET NUMBER: 2010-1143-EAQ-E; IDENTIFIER: RN103117438; LOCATION: Bulverde, Comal County; TYPE OF FACILITY: commercial development; RULE VIOLATED: 30 TAC §213.23(a)(1) and (i) and Edwards Aquifer Protection Plan Number 1372.00, SC Number 5, by failing to obtain approval of a contributing zone plan; PENALTY: $750; ENFORCEMENT COORDINATOR: JR Cao, (512) 239-2543; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(13) COMPANY: LGI HOMES, LIMITED and Quadvest, L.P.; DOCKET NUMBER: 2010-1264-MWD-E; IDENTIFIER: RN104282652; LOCATION: Montgomery County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014531001, Interim I Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for ammonia nitrogen; PENALTY: $5,680; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(14) COMPANY: City of Liberty; DOCKET NUMBER: 2010-1096-MWD-E; IDENTIFIER: RN102078128; LOCATION: Liberty, Liberty County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010108001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for total mercury; 30 TAC §305.125(17) and §319.1 and TPDES Permit Number WQ0010108001, Monitoring and Reporting Requirements Number 1, by failing to submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(17) and §319.1 and TPDES Permit Number WQ0010108001, Biomonitoring Requirements Number 3, by failing to submit a complete biomonitoring report; PENALTY: $36,733; SEP offset amount of $36,733 applied to repairing and replacing private sewer lines for low-income homeowners; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: Matheson Tri-Gas, Inc.; DOCKET NUMBER: 2010-1242-AIR-E; IDENTIFIER: RN102278306; LOCATION:

Stafford, Fort Bend County; TYPE OF FACILITY: industrial gas manufacturing plant; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(b), by failing to prevent nuisance odors; and 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain authorization to operate the ammonia refrigeration system; PENALTY: $4,750; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: Roberto Mendez and Zoila Mendez; DOCKET NUMBER: 2008-0708-PWS-E; IDENTIFIER: RN105473599; LOCATION: San Isidro, Starr County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.41(c)(1)(A) and (D), by failing to locate a well site for public drinking water at least 150 feet from a septic tank drainfield and ensure livestock are not allowed within 50 feet of the wall; 30 TAC §290.41(c)(3)(O), by failing to provide an intruder-resistant fence or lockable building to protect the water system well; 30 TAC §290.41(c)(3)(N), by failing to provide a flow measuring device for the water system well to measure production yields and provide for the accumulation of water production data; 30 TAC §290.41(c)(3)(J), by failing to provide the well with a concrete sealing block extending a minimum of three feet from the exterior well casing in all directions; 30 TAC §290.42(b)(1), by failing to provide disinfection facilities for all ground water supplies for the purpose of microbiological control and distribution protection; 30 TAC §290.46(f), by failing to compile and maintain records of water works operation and maintenance activities for operator reference and commission review; 30 TAC §290.41(c)(1)(F), by failing to secure sanitary control easements covering land within 150 feet of the well; 30 TAC §290.41(c)(3)(K), by failing to properly seal the well head and provide a well casing vent with an opening that is covered with a 16-mesh or finer corrosion resistant screen, facing downward, elevated, and are located as to minimize the drawing of contaminants into the well; 30 TAC §290.39(m), by failing to provide written notification of the reactivation of an existing PWS to the commission; and 30 TAC §290.41(c)(3)(A), by failing to submit well completion data; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(17) COMPANY: City of Port Lavaca; DOCKET NUMBER: 2010-1021-MWD-E; IDENTIFIER: RN101612893; LOCATION: Port Lavaca, Calhoun County; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010251001, Final Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for total copper; PENALTY: $19,950; SEP offset amount of $15,960 applied to Texas Association of Resource Conservation and Development Areas, Inc. - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(18) COMPANY: Pro Star Roll-Off Dumpsters, LLC; DOCKET NUMBER: 2010-0755-MSW-E; IDENTIFIER: RN105909063; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: unauthorized waste transfer station; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized storage and disposal of MSW; PENALTY: $6,750; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(19) COMPANY: Quick Pay Enterprises, Inc. dba Quick Stop 2; DOCKET NUMBER: 2010-1134-PST-E; IDENTIFIER: RN102443561; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain underground storage tank (UST) records and make them immediately available for inspection; 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the UST system; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the UST identification number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube according to the UST registration and self-certification form; 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers, or catchment basins associated with a UST system; 30 TAC §334.54(b)(2), by failing to maintain all piping, pumps, manways, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism; PENALTY: $9,304; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(20) COMPANY: City of Rhome; DOCKET NUMBER: 2010-1404-MWD-E; IDENTIFIER: RN102701620; LOCATION: Wise County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010701002, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for carbonaceous biochemical oxygen demand, chlorine, flow, and TSS; PENALTY: $8,250; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: SHAHZ BROTHERS, INC. dba K-2 Food Mart; DOCKET NUMBER: 2010-0891-PST-E; IDENTIFIER: RN102347960; LOCATION: Robstown, Nueces County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; and 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; PENALTY: $3,330; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2540; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(22) COMPANY: Sherwin Alumina Company, LLC; DOCKET NUMBER: 2010-1216-IHW-E; IDENTIFIER: RN102318847; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: industrial chemical manufacturing; RULE VIOLATED: 30 TAC §335.2(b), by failing to prevent the disposal of ISW at an unauthorized facility; PENALTY: $1,650; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(23) COMPANY: David Lee Sheffield dba Texas Landing Subdivision; DOCKET NUMBER: 2009-1556-PWS-E; IDENTIFIER: RN101210037; LOCATION: Polk County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(b)(1)(C)(ii) and THSC, §341.0315(c), by failing to provide a total storage capacity of 200 gallons per connection; 30 TAC §290.43(c)(3), by failing to provide an overflow that shall be sized to handle the maximum possible fill rate without exceeding the capacity overflow at the facility's ground storage tank; and 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meters at least once every three years; PENALTY: $273; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeo-

duru, (512) 239-1482; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(24) COMPANY: The Lane Construction Corporation; DOCKET NUMBER: 2010-1784-WR-E; IDENTIFIER: RN106012636; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: water rights; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: $350; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(25) COMPANY: TRAILSWEST MOBILE HME PARK, LLC; DOCKET NUMBER: 2010-1174-PWS-E; IDENTIFIER: RN101182855; LOCATION: Bowie County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A) and THSC, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notification of the failure to collect routine samples; 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(A), by failing to collect a minimum of five distribution coliform samples the month following a total coliform positive sample results and by failing to provide public notification regarding the failure to conduct increased monitoring; and 30 TAC §290.51(a)(3) and the Code, §5.702, by failing to pay public health service fees; PENALTY: $2,148; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(26) COMPANY: Unimin Corporation; DOCKET NUMBER: 2010-1164-IWD-E; IDENTIFIER: RN100219120; LOCATION: Cherokee County; TYPE OF FACILITY: ball clay mine with wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0002973000, Effluent Limitations and Monitoring Requirements Number 1 for Outfalls 002, 005, and 006, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for sulfate and total aluminum; PENALTY: $8,820; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(27) COMPANY: University of Texas Medical Branch at Galveston; DOCKET NUMBER: 2010-1180-AIR-E; IDENTIFIER: RN101921138; LOCATION: Galveston, Galveston County; TYPE OF FACILITY: medical waste incinerator; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 56653, SC Numbers 1 and 4, FOP Number O-01531, General Terms and Conditions and Special Terms and Conditions 1(A) and 7, and THSC, §382.085(b), by failing to maintain the maximum limit for nitrogen oxide; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1482, (713) 767-3500.

(28) COMPANY: Westfield Mobile Home Community, Limited; DOCKET NUMBER: 2010-0683-MWD-E; IDENTIFIER: RN101527018; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1) and (5) and §317.4(d) and TPDES Permit Number WQ0012555001, Operational Requirements Number 1, by failing to ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained; 30 TAC §305.125(1), TPDES Permit Number WQ0012555001, Permit Conditions Number 2.g., and the Code, §26.121(a), by failing to prevent unauthorized discharges of wastewater; and 30 TAC §305.125(1), TPDES Permit Number WQ0012555001, Permit Conditions Number 2.d., and the Code, §26.121(a), by failing to prevent unauthorized discharges of sludge; PENALTY: $11,450; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1482, (713) 767-3500.

TRD-201006430
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 9, 2010

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **December 20, 2010.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on December 20, 2010.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: Circle M Bar & Grill, Inc.; DOCKET NUMBER: 2010-1055-PWS-E; TCEQ ID NUMBER: RN101255628; LOCATION: 15914 Telge Road, Cypress, Harris County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect routine distribution water samples for coliform analysis for the months of March 2009 - March 2010; 30 TAC §290.122(c)(2)(B), by failing to provide public notification of the failure to collect routine samples for the months of March 2009 - March 2010; and 30 TAC §290.51(a)(3) and TWC, §5.702, by failing to pay all Public Health Services fees for TCEQ Financial Administration Account Number 91013183; PENALTY: $5,973; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: City of Dodd City; DOCKET NUMBER: 2009-1954-MWD-E; TCEQ ID NUMBER: RN101608867; LOCATION: approximately 2,200 feet southwest of the intersection of State Highway (SH) 897 and United States (U.S.) Highway 82, and 2,500

feet southeast of the intersection of U.S. Highway 82 and Farm-to-Market Road 2077, southeast of Dodd City, Fannin County; TYPE OF FACILITY: domestic waste water system; RULES VIOLATED: 30 TAC §26.121(a), 30 TAC §305.125(1) and Texas Pollutant Elimination System (TPDES) Permit Number WQ0010538001, Effluent Limits and Monitoring Requirements Numbers 1, 3, and 6, by failing to comply with permit effluent limits; and 30 TAC §305.125(17) and §319.1 and TPDES Permit Number WQ0010538001, Monitoring and Reporting Requirements Number 1, by failing to submit effluent monitoring results at the intervals specified in the permit; PENALTY: $14,645, Supplemental Environmental Project (SEP) offset amount of $2,430 applied to Texas Association of Resource Conservation & Development Areas, Inc. (RC&D) - Cleanup of Unauthorized Trash Dumps; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Dennie Shelton; DOCKET NUMBER: 2010-0883-MSW-E; TCEQ ID NUMBER: RN105196703; LOCATION: 301 Wolf Street, Brady, McCullouch County; TYPE OF FACILITY: transformer dismantling and disposal operation; RULES VIOLATED: 30 TAC §330.15(c), by failing to allow and/or causing the unauthorized disposal of municipal solid waste; PENALTY: $7,875; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(4) COMPANY: Granbury Materials, LLC; DOCKET NUMBER: 2010-0276-WQ-E; TCEQ ID NUMBER: RN104582275; LOCATION: 5670 Rollins Road, Granbury, Hood County; TYPE OF FACILITY: sand and gravel mining operation; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to renew authorization to discharge storm water associated with industrial activities; PENALTY: $14,000; SEP offset amount of $2,310 applied to Texas RC&D - Water and Wastewater Assistance Program; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: KD ALLSEASON, INC. dba K D All Season 1; DOCKET NUMBER: 2009-1475-PST-E; TCEQ ID NUMBER: RN101908721; LOCATION: 6275 Airline Drive, Houston, Harris County; TYPE OF FACILITY: two underground storage tanks (USTs) and a convenience store with retail sale of gasoline; RULES VIOLATED: 30 TAC §115.246(1) and THSC, §382.085(b), by failing to maintain Stage II records at the Station and make them immediately available for inspection upon request by agency personnel; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months and the vapor space manifolding and dynamic back pressure at least once every 36 months or upon major system replacement or modification, whichever occurs first; PENALTY: $8,050; STAFF ATTORNEY: Xavier Guerra, Litigation Division, R-13, (210) 403-4016; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: Naseen Khan dba Lucky One Stop; DOCKET NUMBER: 2010-0750-PST-E; TCEQ ID NUMBER: RN101538007; LOCATION: 8445 South Lancaster Road, Dallas, Dallas County; TYPE OF FACILITY: five USTs and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of Stage II equipment at least once every 12 months; PENALTY: $3,936; STAFF ATTORNEY: Marshall Coover, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201006446
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 9, 2010

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **December 20, 2010.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on December 20, 2010.** Comments may also be sent by facsimile machine to the attorney at (512) 2393434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Jackie Hill; DOCKET NUMBER: 2010-0833-MSW-E; TCEQ ID NUMBER: RN105802524; LOCATION: Lots 7 and 8, Block 5 (Coryell County Central Appraisal District Property Identification Numbers 116508 and 116509), Leon Junction, Coryell County; TYPE OF FACILITY: unauthorized municipal solid waste (MSW) disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: $1,050; STAFF ATTORNEY: Marshall Coover, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: KAS INVESTMENTS, LTD.; DOCKET NUMBER: 2010-1165-PWS-E; TCEQ ID NUMBER: RN101761039; LOCATION: 6422 Stephen F. Austin Road, Jones Creek, Brazoria County; TYPE OF FACILITY: convenience store with a public water supply;

RULES VIOLATED: 30 TAC §290.121(a) and (b), by failing to develop and maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the facility will use to comply with the monitoring requirements; 30 TAC §290.110(c)(4)(A), by failing to monitor the disinfectant residual at representative locations in the distribution system at least once every seven days; and 30 TAC §290.41(c)(3)(O) and §290.43(e), by failing to enclose the well with an intruder-resistant fence with a lockable gate or a locked and ventilated well house; PENALTY: $2,825; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: Le Ann Baker, Allan Stuart, Terri Stuart, and Lee Willis dba Pleasure Point Water Supply Corporation; DOCKET NUMBER: 2009-0973-PWS-E; TCEQ ID NUMBER: RN101281749; LOCATION: State Highway 147 approximately 3.5 miles from Zavalla, Angelina County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to comply with the maximum contaminant level (MCL) of 0.080 milligrams/Liter (mg/L) for total trihalomethanes based on the running annual average; 30 TAC §290.113(f)(5) and THSC, §341.0315(c), by failing to comply with the MCL of 0.060 mg/L for haloacetic acid based on the running annual average; 30 TAC §290.41(c)(3)(N), by failing to provide Well Number 3 with a flow measuring device to measure production yields and provide for the accumulation of water production data; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the Facility and its equipment; 30 TAC §290.46(n)(2), by failing to provide an accurate and up-to-date map of the distribution system so that valves and mains can be easily located during emergencies; 30 TAC §290.121(a) and (b), by failing to have a complete and up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the public water supply (PWS) will use to comply with the monitoring requirements; 30 TAC §290.43(c)(3), by failing to provide the overflow on the ground storage tanks with a gravity-hinged and weighted cover that fits tightly with no gap over 1/16 inch; 30 TAC §290.46(d)(2)(A) and §290.110(b)(4), by failing to operate the disinfection equipment to maintain the residual disinfectant concentration in the water within the distribution system at least 0.2 mg/L of free chlorine; 30 TAC §290.46(f)(3)(A)(i)(III), (ii)(III), (iv), (D)(ii), and §290.46(i), by failing to maintain and make available to the commission upon request an accurate and up-to-date record of water works operation and maintenance activities; 30 TAC §290.41(c)(1)(F), by failing to provide sanitary control easements covering all land within 150 feet of the facility's wells; 30 TAC §290.45(b)(1)(C)(i) and THSC, §341.0315(c), by failing to provide a minimum well capacity of 0.6 gallons per minute (gpm) per connection; 30 TAC §290.45(b)(1)(C)(ii) and THSC, §341.0315(c), by failing to provide total storage capacity of 200 gallons per connection; 30 TAC §290.45(b)(1)(C)(iii) and THSC, §341.0375(c), by failing to provide two or more service pumps having a total capacity of 2.0 gpm per connection; 30 TAC §290.45(b)(1)(C)(iv) and THSC, §341.0315(c), by failing to provide a pressure tank capacity of 20 gallons per connection; 30 TAC §290.109(f)(3) and §290.122(b)(2)(A) and THSC, §341.031(a), by exceeding the MCL for coliform bacteria and failing to provide public notice for the MCL exceedence for June 2008; 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(A), by failing to collect at least five routine distribution coliform samples during the month following a total coliform-positive sample result and failing to provide public notice of the failure to conduct bacteriological sampling for the month of July 2008; and 30 TAC §290.109(c)(2)(A)(ii) and THSC, §341.033(d), by failing to collect and submit routing distribution coliform samples for the months of December 2008 - February 2009; PENALTY: $7,389; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(4) COMPANY: Richard L. Tillery; DOCKET NUMBER: 2010-0797-MLM-E; TCEQ ID NUMBER: RN105819452; LOCATION: Lot 50, 2315 Fairdale Road, Hemphill, Sabine County; TYPE OF FACILITY: unauthorized disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste, and 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the general prohibition on outdoor burning; PENALTY: $7,646; STAFF ATTORNEY: Jeffrey J. Huhn, Litigation Division, MC R-13, (210) 403-4023; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Stonehenge Granite of Austin, Inc.; DOCKET NUMBER: 2010-0593-WQ-E; TCEQ ID NUMBER: RN105778211; LOCATION: 12119 West Highway 290, Austin, Hays County; TYPE OF FACILITY: industrial stone cutting site; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities under the Texas Pollutant Discharge Elimination System Multi-Sector General Permit Number TXR050000; PENALTY: $1,050; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

TRD-201006444
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 9, 2010

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Notice of Opportunity to Comment on Shutdown/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **December 20,**

2010. The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on December 20, 2010.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Londonderry Enterprises, Inc. dba New Londonderry Food Mart; DOCKET NUMBER: 2010-0611-PST-E; TCEQ ID NUMBER: RN102901535; LOCATION: 24900 Kuykendahl Road, Tomball, Harris County; TYPE OF FACILITY: two USTs and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued TCEQ delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel; 30 TAC §334.50(b)(1)(A), (2)(A)(i)(III), (d)(1)(B)(ii) and (iii)(I) and TWC, §26.3475(a) and (c)(1), by failing to monitor the UST for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring), by failing to test the line leak detectors at least once per year for performance and operational reliability, by failing to conduct reconciliation of detailed inventory control records at least once each month, in a manner sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons and by failing to record inventory volume measurement for the regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum UST; 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number, according to the UST registration and self-certification form, is permanently applied upon or affixed to either the top of the fill tube or to a non-removable point in the immediate area of the fill tube; 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve (also known as a shear or impact valve) on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers or catchment basins associated with a UST system at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid-tight, and by failing to remove and properly dispose of any liquid found during an inspection within 72 hours; 30 TAC §334.51(b)(2)(C) and TWC, §26.3475(c)(2), by failing to equip the tank with a valve or other appropriate device designed to automatically shut off the flow of regulated substances into the tank when the liquid reaches a preset level no higher than 95% capacity level for the tank; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II vapor recovery system, and each current employee receives in-house Stage II vapor recovery system training regarding the purpose and correct operation of the Stage II equipment; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of Stage II equipment at least once every 12 months; and 30 TAC §115.246(6) and THSC, §382.085(b), by failing to maintain Stage II records at the station; PENALTY: $24,659; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Jerry F. Waneck; DOCKET NUMBER: 2010-0377-PST-E; TCEQ ID NUMBER: RN101699528; LOCATION: 2036 Farm-to-Market Road 535, Rosanky, Bastrop County; TYPE OF FACILITY: three USTs and a currently closed convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of the change or additional information regarding the UST system within 30 days from the date of the occurrence of the change or addition; 30 TAC §334.50(a) and TWC, §26.3475(c)(1), by failing to provide release detection for the UST system; and 30 TAC §334.49(c)(4)(C) and TWC, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; PENALTY: $7,496; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

TRD-201006445
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 9, 2010

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Notice of Request for Public Comment and Notice of Public Meetings for 15 Total Maximum Daily Loads

The Texas Commission on Environmental Quality (TCEQ or commission) has made available for public comment 15 draft total maximum daily loads (TMDLs) corresponding to 15 assessment units (AUs) in nine segments for indicator bacteria in the Lake Houston Watershed (1004E, 1008, 1008H, 1009, 1009C, 1009D, 1009E, 1010, and 1011), of the San Jacinto River Basin, in Harris, Montgomery, Grimes, Liberty, San Jacinto, Walker, and Waller Counties.

The TCEQ will conduct two public meetings to receive comments on the draft TMDLs.

This announcement also constitutes notice that the TMDLs will become part of the State Water Quality Management Plan upon approval by the United States Environmental Protection Agency (EPA).

Texas is required to develop TMDLs for impaired water bodies included in the State of Texas Clean Water Act, §303(d) list of impaired water bodies. A TMDL is a detailed water quality assessment that provides the scientific foundation to allocate pollutant loads in a certain body of water in order to restore and maintain designated uses.

The TCEQ will conduct a public meeting on the draft TMDLs for indicator bacteria on **Wednesday, December 8, 2010, at 6:30 p.m. at the City of Cleveland City Hall, 907 E. Houston Street, Cleveland, Texas 77327.** A second meeting will be on **Thursday, December 9, 2010, at 6:30 p.m. at the Lone Star College-Tomball Campus, Room South-163, 30555 Tomball Parkway, Tomball, Texas 77375.**

The purpose of these public meetings is to provide the public an opportunity to comment on the draft TMDLs. The commission requests comment on each of the major components of the TMDL: problem definition, endpoint identification, source analysis, seasonal variation, linkage between sources and receiving waters, margin of safety, pollutant loading allocation, public participation, and implementation and reasonable assurances. After the public comment period, TCEQ staff may revise the TMDLs, if appropriate. A request will then be made that the final TMDLs be considered by the commission for adoption. Upon adoption of the TMDLs by the commission, the final TMDLs and a response to all comments received will be made available on the TCEQ Web site. The TMDLs will then be submitted to EPA Region 6 for final action by EPA. Upon approval by EPA, the TMDLs will be certified as an update to the State of Texas Water Quality Management Plan.

At these meetings individuals have the opportunity to present oral statements when called upon in order of registration. An agency staff member will give a brief presentation at the start of the meetings and will be available to answer questions before and after public comments have been received.

Comments may be submitted to Jason Leifester, Water Quality Planning Division, Texas Commission on Environmental Quality, MC 203, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1414. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments.* File size restrictions may apply to comments submitted through the eComments system. **All comments should reference Project Number 2010-049-TML-NR/Lake Houston Watershed Total Maximum Daily Loads for Indicator Bacteria. The comment period closes December 20, 2010.** For further information regarding the draft TMDLs, please contact Jason Leifester, Water Quality Planning Division, at (512) 239-6457 or *jleifest@tceq.state.tx.us.* Copies of the draft TMDL document will be available and can be obtained via the commission's Web site at: *http://www.tceq.state.tx.us/implementation/water/tmdl/tmdlcalendar.html* or by calling Earlene Lambeth at (512) 239-3129.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meetings should contact Earlene Lambeth at (512) 239-3129. Requests should be made as far in advance as possible.

TRD-201006429
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 9, 2010

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Notice of Water Quality Applications

The following notice was issued on October 20, 2010 through November 5, 2010.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

MEADWESTVACO TEXAS, L.P., which operates Evadale Mill, A Kraft pulp and paper mill, has applied for the renewal of TPDES Permit No. WQ0000493000 with a major amendment to authorize a reduction in the monitoring frequency for: (a) adsorbable organic halides (AOX) at Outfalls 001 and 01a from once per week to once per year, (b) chloroform at Outfalls 101 and 201 from once per month to once per quarter, (c) 2,3,7,8-TCDF, 3,4,5-Trichlorocatechol, 3,4,5-Trichloroguaiacol, 3,4,6-Trichlorocatechol, 3,4,6-Trichloroguaiacol, 4,5,6-Trichloroguaiacol, Tetrachlorocatechol, Tetrachloroguaiacol, Trichlorosyringol, 2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD), 2,4,5-Trichlorophenol, 2,4,6-Trichlorophenol, 2,3,4,6-Tetrachlorophenol, and Pentachlorophenol at Outfalls 101 and 201 from once per quarter to once per year, and (d) TCDD Equivalents at Outfalls 001 and 01a from once per quarter to once per year. The current permit authorizes the discharge of treated process wastewater commingled with cooling water, domestic wastewater, storm water runoff, and previously monitored effluents (bleach plant effluent via internal outfalls 101 and 201) at a daily average flow not to exceed 65,000,000 gallons per day via Outfalls 001 and 01a; storm water runoff commingled with previously monitored effluent (filter backwash water via internal Outfall 102), utility wastewater, periodic overflows from the woodyard sump-dam and car rinse runoff on an intermittent and flow variable basis via Outfall 002. The facility is located approximately one mile south of Farm-to-Market Road 2246 and one mile southeast of the Town of Evadale, Jasper County, Texas 77615.

WAYNE ROBERT JOHNSON, which operates Fabens Delinting Plant, a cottonseed delinting plant, has applied for a renewal of TPDES Permit No. WQ0000516000, which authorizes the discharge of delinting process wash water at a daily average flow not to exceed 38,000 gallons per day via Outfall 001. The facility is located at 410 Freidman Street, in the community of Fabens, El Paso County, Texas 79838.

FLINT HILLS RESOURCES, LP, which operates the West Refinery, a petroleum refinery (comprised of the West Crude Area, the East Plant, the Mid-Plant, and tank farms), the Mid-Terminal, a tank farm and terminal facility, and irrigated Land Treatment Units (LTU's) 1 and 2, has applied for a major amendment with renewal to TPDES Permit No. WQ0000531000 to add the discharge of hydrostatic test and firewater test wastewaters, steam and air conditioner condensate, reverse osmosis concentrate wastewaters, uncontaminated groundwater, and storm water on an intermittent and flow variable basics via new Outfall 013; and add potable water to the definition of utility wastewaters authorized for discharge via Outfalls 001 and 012. The current permit authorizes the discharge of treated process, storm water, groundwater, marine-generated, domestic, and utility wastewaters from the West Refinery, contaminated water generated at other facilities, and treated storm water associated with construction activities at a daily average flow not to exceed 5,300,000 gallons per day via Outfall 001 or Outfall 012; discharges of hydrostatic test and firewater test wastewaters, steam and air conditioner condensate, reverse osmosis concentrate wastewaters, uncontaminated groundwater, and storm water on an intermittent and flow variable basis via Outfalls 002, 003, 006, 007, and 010; hydrostatic test and firewater test wastewaters, steam and air conditioner condensate, reverse osmosis concentrate wastewaters, uncontaminated groundwater, emergency discharges of Fluid Catalytic Cracking Unit (FCCU) seal tank water, storm water, and wet weather discharges of cooling tower and boiler blowdown, and the de minimus wet-weather seepage of Outfall 004 wastewaters via the Outfall 012 weir, on an intermittent and flow variable basis via Outfall 004; discharges of hydrostatic test

and firewater test wastewaters, steam and air conditioner condensate, reverse osmosis concentrate wastewaters, uncontaminated groundwater, storm water, and with wet-weather discharges of cooling tower and boiler blowdown on an intermittent and flow variable basis via Outfalls 005, 008, and 009; and firewater and firewater test wastewaters and steam and air condition condensate on an intermittent and flow variable basis via Outfall 011. The facility is located east and west of Suntide Road and north of Up River Road in the northwest area of, and on the south side of the end of Tribble Lane, in the northern area of the City of Corpus Christi; and LTU's 1 and 2 are located approximately 5,000 feet northwest of the intersection of Suntide Road and Up River Road, in the northwest area of the City of Corpus Christ, Nueces County, Texas 78409. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

GB BIOSCIENCES CORPORATION, which operates the Greens Bayou Plant, that manufactures and formulates agricultural pesticide products, has applied for a major amendment with renewal to TPDES Permit No. WQ0000749000 to authorize the discharge of storm water runoff on an intermittent and flow variable basis via new Outfalls 002, 003, 004, 005 and 006, and to authorize an increase the effluent limitations for all parameters at Outfall 101 due to an increase in production. The discharge of storm water runoff is currently authorized under the Texas Pollutant Discharge Elimination System Multi-Sector Industrial General Permit for Stormwater-TXR050000, Authorization No. TXR05K501. The current permit authorizes the discharge of treated process wastewater, incinerator wastewater, groundwater, and non-process wastewater at a daily average flow not to exceed 900,000 gallons per day via Outfall 101; treated storm water on an intermittent and flow variable basis via Outfall 201; and the discharge of combined treated effluent from Outfalls 101 and 201 on an intermittent and flow variable basis via Outfall 001. The facility is located at 2239 Haden Road in the extraterritorial jurisdiction of the City of Houston in Harris County, Texas 77015.

CITY PUBLIC SERVICE OF SAN ANTONIO, which operates Sommers/Deely/Spruce Steam Electric Station, has applied for a renewal of TPDES Permit No. WQ0001514000, which authorizes the discharge of once-through cooling water and previously monitored effluents from Sommers Units 1 & 2 and from Deely Units 1 & 2 at a daily average flow not to exceed 1,440,000,000 gallons per day via Outfall 001; low volume waste, metal cleaning waste and storm water from construction activities on an intermittent and flow variable basis via Outfall 002; storm water from diked storage areas on an intermittent and flow variable basis via Outfall 006; once-through cooling water and previously monitored effluents from Spruce Units 1 & 2 at a daily average flow not to exceed 1,440,000,000 gallons per day via Outfall 007; and storm water on an intermittent and flow variable basis via Outfall 014. The facility is located adjacent to Calaveras Lake at 9599 Gardner Road, east-southeast of the City of San Antonio, Bexar County, Texas 78263.

REYNOLDS METALS COMPANY has applied for a renewal of TCEQ Permit No. WQ0003966000 (E.P.A. I.D. No. TXL005001), which authorizes the disposal of sewage sludge on approximately 190 acres of land. This permit will not authorize a discharge of pollutants into waters in the State. The sewage sludge land application site is located on the south side of State Highway 361 adjacent to its intersection with State Highway 35, approximately one mile southeast of the City of Gregory, in San Patricio County, Texas 78359.

CITY OF TEXARKANA has applied for a renewal of TPDES Permit No. WQ0010374007, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility is located approximately 2,300 feet west of Spur 151 and 3,300 feet south of State Highway 82 in Bowie County, Texas 75569.

CITY OF AMARILLO has applied for a renewal of TPDES Permit No. WQ0010392001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 16,000,000 gallons per day. The current permit also authorizes the land application of sewage sludge on 76 acres of a dedicated land disposal site. The applicant has also applied to the TCEQ for approval of a substantial modification to its pretreatment program under the TPDES program. The facility is located at 12600 Reclamation Road, approximately 1.5 miles east of U.S. Highway 87, approximately 10 miles north-northeast of the intersection of Interstate Highway 40 and U.S. Highway 87 in the City of Amarillo in Potter County, Texas 79108.

CITY OF ANGLETON has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0010548004 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,600,000 gallons per day. The facility is located adjacent to and south of County Road 609 (Old Highway 35), approximately 1.5 miles southwest of the intersection of State Highway 35 and State Highway 288 in Brazoria County, Texas 77515.

CITY OF GAINESVILLE has applied for a renewal of TPDES Permit No. WQ0010726002, which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 50,000 gallons per day. The facility is located at 209 North Lake Lane, approximately two miles northwest of the intersection of Interstate Highway 35 and Farm-to-Market Road 1202 outside the Gainesville city limits in Cooke County, Texas 76240.

GRAY UTILITY SERVICE L.L.C. has applied for a major amendment to TPDES Permit No. WQ0011449001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 600,000 gallons per day to a daily average flow not to exceed 900,000 gallons per day. The facility is located at 5601 Farm-to-Market Road 565 South, in the City of Baytown in Chambers County, Texas 77580. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF RENO has applied for a renewal of TPDES Permit No. WQ0012162001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 522,000 gallons per day. The facility is located approximately 1 1/3 miles southwest of the intersection of Farm-to-Market Road 195 and Northwest Seventh Street in Lamar County, Texas 75462.

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 24 has applied for a renewal of TPDES Permit No. WQ0012655001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located at 5502 Green Lane, approximately 0.3 mile west of Bammel-North Houston Road, 1.6 miles north of the intersection of State Highway 249 and Bammel-North Houston Road, and 2.9 miles southeast of the intersection of State Highway 249 and Farm-to-Market Road 1960 in Harris County, Texas 77066.

CITY OF MANVEL has applied for a renewal of TPDES Permit No. WQ0013872001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 0.8 mile northwest of the intersection of State Highway 6 and Farm-to-Market Road 1128 in Brazoria County, Texas 77581.

AQUA WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0014361001, which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 49,000 gallons per day. The facility is located approximately 1,750 feet east of State Highway 304, approximately 1.12 miles north of the intersection of State Highway 304 and State Highway 713 in Caldwell County, Texas 78953.

MHC TT, INC. has applied for a renewal of TCEQ Permit No. 14396-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day via evaporation on 2.87 acres of land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located 3.5 miles east of U.S. Highway 377 and approximately 8.3 miles north of U.S. Highway 82 in Grayson County, Texas 76245.

MONTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT NO. 94 has applied for a renewal of TPDES Permit No. WQ0014656001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,080,000 gallons per day. The facility is located at 27209 Jessica Hills Lane, Spring, approximately 8,300 feet southeast of the intersection of Springs Trails Ridge and Riley-Fuzzell Road on the north side of Spring Creek in Montgomery County, Texas 77386.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201006498
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 10, 2010

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on November 3, 2010, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Downstream Environmental, LLC; SOAH Docket No. 582-10-1474; TCEQ Docket No. 2009-0862-MSW-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Downstream Environmental, LLC on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201006499
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 10, 2010

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Public Hearing on Proposed Revisions to 30 TAC Chapter 35 and New Chapter 298

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed new 30 TAC Chapter 298, Environmental Flow Standards for Surface Water, and revisions to §35.101 of 30 TAC Chapter 35, Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions.

The proposed rulemaking would implement House Bill 3 and Senate Bill 3, 80th Legislature, 2007, relating to the establishment of environmental flow standards, and procedures for implementing an adjustment of conditions included in a permit or amended water right in the river and bay systems consisting of the Sabine and Neches Rivers and Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay; also relating to emergency authority to make available water set aside for beneficial inflows to affected bays and estuaries and instream uses.

The commission will hold a public hearing on this proposal in Austin on December 16, 2010, at 10:00 am in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services, at (512) 239-0779. Requests should be made as far in advance as possible.

Written comments may be submitted to Natalia Henricksen, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-049-298-OW. The comment period closes December 20, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Ron Ellis, Water Supply Division, (512) 239-1282.

TRD-201006384
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 5, 2010

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Public Hearing on Proposed Revisions to 30 TAC Chapters 101 and 106

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapters 101, General Air Quality Rules, and 106, Permits By Rule, §101.1 and §106.4, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would add specific definitions related to particulate matter with diameters less than 2.5 micrometers ($PM_{2.5}$) regulation and address known requirements for implementation.

The commission will hold a public hearing on this proposal in Austin on December 13, 2010, at 10:00 a.m. in Building E Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services, at (512) 239-0779. Requests should be made as far in advance as possible.

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2010-020-101-PR. The comment period closes December 20, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Johnny Bowers, Air Permits Division, (512) 239-6770.

TRD-201006334
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 5, 2010

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Public Hearing on Proposed Revisions to 30 TAC Chapter 117 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 117, Control of Air Pollution from Nitrogen Compounds; Subchapter D, Combustion Control at Minor Sources in Ozone Nonattainment Areas; Division 2, Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Minor Sources; §117.2110 and to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United States Environmental Protection Agency concerning SIPs.

The proposed rulemaking would amend Chapter 117, Subchapter D, Division 2, §117.2110(a)(1)(B)(ii)(I) to expand the emission specification for lean-burn engines fired on landfill gas to include lean-burn engines fired on biogas at minor sources of nitrogen oxides (NO_x) in the DFW 1997 eight-hour ozone nonattainment area. The current applicable NO_x emission specification in §117.2110(a)(1)(B)(ii)(II) for gas-fired lean-burn engines using gaseous fuels other than landfill gas that are installed, modified, reconstructed, or relocated on or after June 1, 2007, is 0.50 grams per horsepower-hour (g/hp-hr). Landfill gas and other biogas are produced from anaerobic digestion or decomposition of organic matter and have similar fuel and combustion characteristics. Both landfill gas and other biogas can contain contaminants such as sulfur, chlorine, and silicon. Consequently, engines fired on landfill gas and other biogas can have technological feasibility issues with regard to the installation of a NO_x control catalyst because these contaminants can result in catalyst failure or deactivation in hours or days. The technological feasibility issues with regard to the installation of a NO_x control catalyst is the basis for the 0.60 g/hp-hr emission standard in the current rule and the justification for the proposed expansion of the existing emission specification to include lean-burn engines fired on biogas at minor sources of NO_x in the DFW 1997 eight-hour ozone nonattainment area.

A public hearing for the proposed rulemaking and SIP revision has been scheduled in Fort Worth on December 14, 2010, at 2:00 p.m. at the Texas Commission on Environmental Quality, Region 4 Office, DFW Public Meeting Room, 2309 Gravel Road, Fort Worth, TX 76118. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Texas Register Team, Office of Legal Services, at (512) 239-0779. Requests should be made as far in advance as possible.

Comments may be submitted to Natalia Henricksen, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *www.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-048-117-EN. Comments must be received by December 20, 2010. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Ray Schubert, Air Quality Planning Section, at (512) 239-6615.

TRD-201006383
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 5, 2010

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Texas Facilities Commission

Request for Proposals #303-1-20258

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission (HHSC), Department of State Health Services (DSHS), and Department of Family and Protective Services (DFPS), announces the issuance of Request for Proposals (RFP) #303-1-20258. TFC seeks a five (5) or ten (10) year lease of approximately 5,215 square feet of office space in County of Rockwall or County of Hunt, Texas.

The deadline for questions is December 10, 2010, and the deadline for proposals is December 17, 2010, at 3:00 p.m. The target award date is January 19, 2011. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Contract Specialist Sandy Williams at (512) 475-0453 or sandy.williams@tfc.state.tx.us. Any addendum to the original RFP will be posted to the Electronic State Business Daily (ESBD). A copy of

the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid.cfm?bidid=91841.*

TRD-201006500
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 10, 2010

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Request for Proposals #303-1-20259

The Texas Facilities Commission (TFC), on behalf of the Office of the Attorney General, announces the issuance of Request for Proposals (RFP) #303-1-20259. TFC seeks a five year lease of approximately 9,714 square feet of office space in San Antonio, Texas.

The deadline for questions is December 10, 2010, and the deadline for proposals is December 17, 2010, at 3:00 p.m. The target award date is February 16, 2011. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Contract Specialist Sandy Williams at (512) 475-0453 or sandy.williams@tfc.state.tx.us. Any addendum to the original RFP will be posted to the Electronic State Business Daily. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=91842.*

TRD-201006496
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 10, 2010

♦ ♦ ♦

Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 10-068, Amendment Number 961, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The proposed amendment updates the service description to clarify the scope of service and provider qualifications for specialized rehabilitative services provided by Early Childhood Intervention providers. The proposed amendment also moves these rehabilitative services into the Early Periodic Screening Diagnosis and Treatment section of the Medicaid state plan. The amendment is not expected to impact either state or federal budgets. The requested effective date for the proposed amendment is October 1, 2011.

To obtain copies of the proposed amendment, interested parties may contact Tamela Griffin by mail at the Department of Assistive and Rehabilitative Services, MC 3029, 4900 North Lamar Boulevard, Austin, Texas 78751-2399; by telephone at (512) 424-6754; by facsimile at (512) 424-6749; or by e-mail at tamela.griffin@dars.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201006387
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: November 5, 2010

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Texas Department of Insurance

Notice of Filing

The Texas Automobile Insurance Plan Association (TAIPA) has filed Petition No. A-0910-08, proposing amendments to the Plan of Operation (Plan) for consideration by the Commissioner of Insurance (Commissioner). The petition contains amendments to the Plan that have been approved by the TAIPA Governing Committee.

Section 2151.151 of the Insurance Code provides that the TAIPA Governing Committee may amend the Plan of Operation, subject to the approval of the Commissioner.

In Petition No. A-0910-08, TAIPA proposes to amend the Plan to update statutory citations and clarify existing terminology referring to the issuance of a two-year policy.

Proposed amendments to §§5.B.2, 14.A.2, 21.B.2, and 32.A.2 amend the statutory citation from §1.F.(e) of the Texas Motor Vehicle Safety Responsibility Act to §601.262 of the Texas Transportation Code.

The amendments to §§5.B.2, 14.A.2, 21.B.2, and 32.A.2 also remove the exception that requires a two-year policy term for a second subsequent conviction under §601.261, because the exception contradicts provisions of these Plan sections. These amendments require insurers to issue a one-year policy with a certificate agreeing to renew it for one year.

The proposed amendments move the conflicts provision concerning §5.B.3 from §5.B.2 to §5.B.3. The proposal also deletes the conflicts provision concerning §5.B.3 in §14.A.2.

Proposed amendments to §21.B.2 and §21.B.3 move the conflicts provision from §21.B.2 to §21.B.3. The proposal also deletes the conflicts provision concerning §21.B.3 in §32.A.2. Finally, the proposed amendments clarify the language in §32.A.2 by inserting the word "policy" after "renewal" in the second paragraph.

This description of proposed Plan amendments is a summary prepared by the Texas Department of Insurance. For the full text of the proposed amendments, a copy of the petition, or further information, contact Cathleen Beavers at TAIPA at (866) 321-9154.

These amendments are subject to the Commissioner's consideration for approval without a hearing. Any comments may be filed with the Office of the Chief Clerk, Texas Department of Insurance, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104, within 20 days after publication of this notice, with an additional copy submitted to Cathleen Beavers, Texas Automobile Insurance Plan Association, 4301 Westbank Drive, Suite 200, Austin, Texas 78746.

TRD-201006265
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 4, 2010

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Texas Lottery Commission

Instant Game Number 1276 "Texas Lottery® Black"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1276 is "TEXAS LOTTERY® BLACK." The play style is "key number match with auto win."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1276 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 1276.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, COIN SYMBOL, $10.00, $20.00, $50.00, $100, $200, $500, $1,000, $10,000 and $1MILL SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1276 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
COIN SYMBOL	COIN
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND

$500	FIV HUND
$1,000	ONE THOU
$10,000	10 THOU
$1MILL SYMBOL	ONE MILL

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000, $10,000 or $1,000,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1276), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 1276-0000001-001.

K. Pack - A pack of "TEXAS LOTTERY® BLACK" Instant Game tickets contains 25 tickets, packed in plastic shrink-wrapping and fan-folded in pages of one (1). Ticket back 001 and 050 will both be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TEXAS LOTTERY® BLACK" Instant Game No. 1276 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TEXAS LOTTERY® BLACK" Instant Game is determined once the latex on the ticket is scratched off to expose 66 (sixty-six) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the PRIZE for that number. If a player reveals a "coin" play symbol, the player wins the PRIZE for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 66 (sixty-six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 66 (sixty-six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 66 (sixty-six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 66 (sixty-six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award

of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

C. No duplicate WINNING NUMBERS play symbols on a ticket.

D. No more than five duplicate non-winning prize symbols on a ticket.

E. A non-winning prize symbol will never be the same as a winning prize symbol.

F. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 10 and $10).

G. The "COIN" (auto win) play symbol will only appear once on a ticket.

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "TEXAS LOTTERY® BLACK" Instant Game prize of $10.00, $20.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "TEXAS LOTTERY® BLACK" Instant Game prize of $1,000, $5,000 or $10,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a "TEXAS LOTTERY® BLACK" top level prize of $1,000,000 the claimant must sign the winning ticket and present it at Texas Lottery Commission headquarters in Austin, Texas. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. As an alternative method of claiming a "TEXAS LOTTERY® BLACK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

E. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TEXAS LOTTERY® BLACK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TEXAS LOTTERY® BLACK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1276. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1276 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$10	960,000	6.25
$20	840,000	7.14
$50	90,000	66.67
$100	25,000	240.00
$200	9,000	666.67
$500	4,300	1,395.35
$1,000	400	15,000.00
$5,000	100	60,000.00
$10,000	16	375,000.00
$1,000,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.32. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1276 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1276, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201006428

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 9, 2010

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Instant Game Number 1277 "Casino Action"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1277 is "CASINO ACTION". The play style for this game is "multiple games".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1277 shall be $50.00 per ticket.

1.2 Definitions in Instant Game No. 1277.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black and possible red play symbols are: $50.00, $70.00, $100, $200, $500, $1,000, $2,000, $10,000, $7,500,000, 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, CHERRY SYMBOL, LEMON SYMBOL, BILLS SYMBOL, CROWN SYMBOL, HORSESHOE SYMBOL, WISHBONE SYMBOL, POT OF GOLD SYMBOL, GOLD BAR SYMBOL and BELL SYMBOL. The possible black only play symbols are: ONE DOT SYMBOL, TWO DOTS SYMBOL, THREE DOTS SYMBOL, FOUR DOTS SYMBOL, FIVE DOTS SYMBOL and SIX DOTS SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1277 - 1.2D

PLAY SYMBOL	CAPTION
$50.00 (BLACK and RED)	FIFTY
$70.00 (BLACK and RED)	SEVENTY
$100 (BLACK and RED)	ONE HUN
$200 (BLACK and RED)	TWO HUN
$500 (BLACK and RED)	FIV HUN
$1,000 (BLACK and RED)	ONE THO
$2,000 (BLACK and RED)	TWO THO
$10,000 (BLACK and RED)	TEN THO
$7,500,000 (BLACK and RED)	7.5 MILL
01 (BLACK and RED)	ONE
02 (BLACK and RED)	TWO
03 (BLACK and RED)	THR
04 (BLACK and RED)	FOR
05 (BLACK and RED))	FIV
06 (BLACK and RED)	SIX
07 (BLACK and RED)	SVN
08 (BLACK and RED)	EGHT
09 (BLACK and RED)	NINE
10 (BLACK and RED)	TEN
11 (BLACK and RED)	ELVN
12 (BLACK and RED)	TWLV
13 (BLACK and RED)	THRTN
14 (BLACK and RED)	FORTN
15 (BLACK and RED)	FIFTN
16 (BLACK and RED)	SIXTN
17 (BLACK and RED)	SVTN
18 (BLACK and RED)	EGHTN
19 (BLACK and RED)	NINTN
20 (BLACK and RED)	TWTY
21 (BLACK and RED)	TWONE
22 (BLACK and RED)	TWTWO
23 (BLACK and RED)	TWTHR
24 (BLACK and RED)	TWFOR
25 (BLACK and RED)	TWFIVE
26 (BLACK and RED)	TWSIX
27 (BLACK and RED)	TWSVN
28 (BLACK and RED)	TWEGT
29 (BLACK and RED)	TWNINE
30 (BLACK and RED)	THIRTY
31 (BLACK and RED)	THRON
32 (BLACK and RED)	THTWO
33 (BLACK and RED)	THTHR
34 (BLACK and RED)	THFOR
35 (BLACK and RED)	THFIV
36 (BLACK and RED)	THSIX
CHERRY SYMBOL (BLACK and RED)	CHERRY

LEMON SYMBOL (BLACK and RED)	LEMON
BILLS SYMBOL (BLACK and RED)	BILLS
CROWN SYMBOL (BLACK and RED)	CROWN
HORSESHOE SYMBOL (BLACK and RED)	HRSHOE
WISHBONE SYMBOL (BLACK and RED)	WISHBN
POT OF GOLD SYMBOL (BLACK and RED)	GOLD
GOLD BAR SYMBOL (BLACK and RED)	BAR
BELL SYMBOL (BLACK and RED)	BELL
ONE DOT SYMBOL (BLACK)	ONE
TWO DOTS SYMBOL (BLACK)	TWO
THREE DOTS SYMBOL (BLACK)	THR
FOUR DOTS SYMBOL (BLACK)	FOR
FIVE DOTS SYMBOL (BLACK)	FIV
SIX DOTS SYMBOL (BLACK)	SIX

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Mid-Tier Prize - A prize of $50.00, $70.00, $100, $120, $140, $150, $200 or $500.

G. High-Tier Prize - A prize of $1,000, $1,250, $2,000, $10,000 or $7,500,000.

H. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

I. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1277), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 020 within each pack. The format will be: 1277-0000001-001.

J. Pack - A pack of "CASINO ACTION" Instant Game tickets contains 020 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The back of ticket 001 will be shown on the front of the pack; the back of ticket 020 will be revealed on the back of the pack. There will be no breaks between the tickets in a pack.

K. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

L. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CASINO ACTION" Instant Game No. 1277 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "CASINO ACTION" Instant Game is determined once the latex on the ticket is scratched off to expose 70 (seventy) Play Symbols. ROULETTE: If a player matches any of YOUR NUMBERS play symbols to either of the WINNING NUMBERS play symbol, the player wins the prize for that number. If the matching YOUR NUMBER play symbol is RED, the player wins DOUBLE the prize for that number. SLOTS: If a player reveals 3 identical symbols in the same ROW, the player wins the PRIZE for that ROW. If a player reveals 3 identical RED symbols in the same ROW, the player wins DOUBLE the prize for that ROW. DEALER'S HAND: If a player reveals 3 identical prize amounts in the same GAME, the player wins that amount. If a player reveals 3 identical RED prize amounts in the same GAME, the player wins DOUBLE that amount. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 70 (seventy) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 70 (seventy) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 70 (seventy) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 70 (seventy) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a pack will not have identical play data, spot for spot.

B. A ticket will win as indicated by the prize structure.

C. A ticket can win up to twenty-five (25) times.

D. ROULETTE: Players can win up to ten (10) times in this play area.

E. ROULETTE: This play area consists of ten (10) YOUR NUMBERS, ten (10) Prize symbols and two (2) WINNING NUMBERS.

F. ROULETTE: On tickets winning more than one (1) time in this play area, both WINNING NUMBERS will be used to create the wins.

G. ROULETTE: On non-winning tickets, a WINNING NUMBER will never match a YOUR NUMBER.

H. ROULETTE: On winning and non-winning tickets, all non-winning YOUR NUMBERS are to be different from each other, regardless of color.

I. ROULETTE: The two (2) WINNING NUMBERS will be imaged in BLACK only.

J. ROULETTE: The two (2) WINNING NUMBERS will always be different from each other (no duplicates).

K. ROULETTE: Two or more of the same YOUR NUMBERS play symbols cannot appear in both RED and BLACK on the same ticket.

L. SLOTS: Players can win up to six (6) times in this play area.

M. SLOTS: The play area consists of eighteen (18) play symbols and six (6) prize symbols.

N. SLOTS: There will never be three (3) identical symbols in a vertical or diagonal line, regardless of color.

O. SLOTS: No prize amount will appear more than once in this play area, regardless of color, except as required on multiple win tickets.

P. SLOTS: Within a ROW, the three (3) play symbols and corresponding prize amount will all be BLACK or all be RED, with respect to other restrictions.

Q. SLOTS: Non-winning play symbols will never appear more than twice over the entire play area, regardless of color.

R. SLOTS: Winning tickets will contain three (3) matching play symbols in a horizontal row.

S. SLOTS: A winning ROW will never match another winning ROW on the same ticket (i.e. if a ROW wins with three (3) CROWNS, no other winning ROW on the same ticket will display three (3) CROWNS).

T. SLOTS: On winning tickets, non-winning games will have different prize amounts from the winning prize amounts in this play area, regardless of color.

U. DEALER'S HAND: Players can win up to six (6) times in this play area.

V. DEALER'S HAND: The play area consists of eighteen (18) Prize symbols.

W. DEALER'S HAND. The eighteen (18) prize symbols in this play area will be imaged in RED and BLACK, with all three (3) prize symbols within a game always the same color (i.e. all BLACK or all RED within a game).

X. CHIPS: Players can win up to three (3) times in this play area.

Y. CHIPS: Each of the three (3) play areas in this game will consist of two (2) dice symbols and a "+" sign.

2.3 Procedure for Claiming Prizes.

A. To claim a "CASINO ACTION" Instant Game prize of $50.00, $70.00, $100, $120, $140, $150, $200, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $70.00, $100, $120, $140, $150, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim

any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CASINO ACTION" Instant Game prize of $1,000, $1,250, $2,000 or $10,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a "CASINO ACTION" top level prize of $7,500,000, claimant must sign the winning ticket and present it at Texas Lottery Commission headquarters in Austin, Texas. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. As an alternative method of claiming a "CASINO ACTION" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

E. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "CASINO ACTION" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "CASINO ACTION" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 3,720,000 tickets in the Instant Game No. 1277. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1277 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$50	558,000	6.67
$70	651,000	5.71
$100	201,500	18.46
$120	12,400	300.00
$140	17,670	210.53
$150	27,125	137.14
$200	14,260	260.87
$500	14,260	260.87
$1,000	5,022	740.74
$1,250	713	5,217.39
$2,000	1,984	1,875.00
$10,000	104	33,769.23
$7,500,000	3	1,240,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 2.47. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1277 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1277, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201006264
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 4, 2010

♦ ♦ ♦

Instant Game Number 1299 "Pieces of 8"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1299 is "PIECES OF 8." The play style is "key number match with auto win."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1299 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1299.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 8 SYMBOL, $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $18.00, $38.00, $88, $188 or $888.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1299 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
9	NIN
10	TEN
11	ELV
12	TLV
8 SYMBOL	EGT
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$8.00	EIGHT$
$10.00	TEN$
$18.00	EIGTN
$38.00	THY EGT
$88.00	ETY EGT
$188.00	1 HUND 88
$888	8 HUND 88

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $8.00, $10.00 or $18.00.

G. Mid-Tier Prize - A prize of $38.00, $88.00 or $188.

H. High-Tier Prize - A prize of $888.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1299), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1299-0000001-001.

K. Pack - A pack of "PIECES OF 8" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "PIECES OF 8" Instant Game No. 1299 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "PIECES OF 8" Instant Game is determined once the latex on the ticket is scratched off to expose 10 (ten) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to either WINNING NUMBER play symbol, the player wins the prize shown. If a player reveals an "8" play symbol, the player wins the prize for that symbol instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 10 (ten) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 10 (ten) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 10 (ten) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols on a ticket.

C. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. The "8" (auto win) play symbol will never appear more than once on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize will appear on every ticket unless otherwise restricted by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "PIECES OF 8" Instant Game prize of $1.00, $2.00, $4.00, $8.00, $10.00, $18.00, $38.00, $88.00 or $188, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $38.00, $88.00 or $188 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "PIECES OF 8" Instant Game prize of $888, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "PIECES OF 8" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated

by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "PIECES OF 8" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "PIECES OF 8" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1299. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1299 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	806,400	12.50
$2	873,600	11.54
$4	302,400	33.33
$8	50,400	200.00
$10	67,200	150.00
$18	33,600	300.00
$38	6,300	1,600.00
$88	1,050	9,600.00
$188	462	21,818.18
$888	210	48,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.71. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1299 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1299, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201006402
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 8, 2010

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Instant Game Number 1306 "Cactus Cash"

1.0 Name and Style of Game No. 1306

A. The name of Instant Game No. 1306 is "CACTUS CASH." The play style is "key number match."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1306 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1306.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100 or $1,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1306 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100.00	ONE HUND
$1,000	ONE THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1306), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1306-0000001-001.

K. Pack - A pack of "CACTUS CASH" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CACTUS CASH" Instant Game No. 1306 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "CACTUS CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 11 (eleven) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to the WINNING NUMBER play symbol, the player wins the prize for that number. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 11 (eleven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 11 (eleven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 11 (eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 11 (eleven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols on a ticket.

C. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

D. Non-winning prize symbols will never be the same as the winning prize symbol(s).

E. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

F. The top prize will appear on every ticket unless otherwise restricted by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "CACTUS CASH" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CACTUS CASH" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate

income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "CACTUS CASH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "CACTUS CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "CACTUS CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1306. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1306 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,209,600	8.33
$2	705,600	14.29
$4	252,000	40.00
$5	67,200	150.00
$10	67,200	150.00
$20	21,000	480.00
$50	16,632	606.06
$100	756	13,333.33
$1,000	84	120,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.31. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1306 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1306, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201006403
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 8, 2010

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Instant Game Number 1349 "Set for Life"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1349 is "SET FOR LIFE." The play style is "key number match with auto win and 10X."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1349 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 1349.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, MONEY BAG SYMBOL, STAR SYMBOL, LIFE SYMBOL, $10.00, $20.00, $50.00, $100, $200, $1,000, $2,500 or $250K/YR SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1349 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
MONEY BAG SYMBOL	MBAG
STAR SYMBOL	WINX10
LIFE SYMBOL	WIN
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY

$100	ONE HUND
$200	TWO HUND
$1,000	ONE THOU
$2,500	25 HUND
$250K/YR	250K/YR

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200 or $500.

H. High-Tier Prize - A prize of $1,000, $2,500 or $250,000/year (not to exceed $5,000,000).

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1349), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 1349-0000001-001.

K. Pack - A pack of "SET FOR LIFE" Instant Game tickets contains 50 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket back 050 will be exposed on one side of the pack and ticket 001 on the other side.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SET FOR LIFE" Instant Game No. 1349 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SET FOR LIFE" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) play symbols. If the player matches any of YOUR NUMBERS to any of the WINNING NUMBERS, the player wins the PRIZE for that number. If the player reveals a MONEY BAG SYMBOL, the player wins the PRIZE for that symbol. If the player reveals a STAR SYMBOL, the player wins 10 times the prize for that symbol. If the player reveals a LIFE SYMBOL, the player wins $250,000 per year (not to exceed $5,000,000 total). No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 44 (forty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 44 (forty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 44 (forty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No five or more like non-winning prize symbols on a ticket.

C. No duplicate WINNING NUMBERS play symbols on a ticket.

D. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

E. The STAR (win x 10) play symbol will only appear on intended winning tickets as dictated by the prize structure.

F. The LIFE (win $250,000/year) play symbol will only appear with the $250,000/YR prize symbol and both symbols will only appear on the three winning tickets as dictated by the prize structure.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 10 and $10).

2.3 Procedure for Claiming Prizes.

A. To claim a "SET FOR LIFE" Instant Game prize of $10.00, $20.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SET FOR LIFE" Instant Game prize of $1,000 or $2,500, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a "SET FOR LIFE" top level prize of $250,000 per year (not to exceed $5,000,000 total), the claimant must sign the winning ticket and present it at Texas Lottery Commission headquarters in Austin, Texas. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. When claiming a "SET FOR LIFE" Instant Game prize of $250,000 per year (not to exceed $5,000,000 total), the claimant will receive payments:

1. Annually via direct deposit to the winner's account. With this plan, upon validation of the prize, a payment of $250,000 less any taxes and/or other offsets or mandatory withholdings required by law, will be made once a year on the first business day of the anniversary month of the claim. Annual payments will be made for a period of 19 years or a total of 19 annual payments. One additional payment of $250,000 less any taxes and/or other offsets or mandatory withholdings required by law, will be made to reach the total maximum payment of $5,000,000.

2. If a payment falls on a holiday or weekend, the payment will be made on the following business day.

E. As an alternative method of claiming a "SET FOR LIFE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

F. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

G. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SET FOR LIFE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SET FOR LIFE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 12,000,000 tickets in the Instant Game No. 1349. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1349 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$10	1,440,000	8.33
$20	1,200,000	10.00
$50	200,000	60.00
$100	161,500	74.30
$200	25,200	476.19
$500	3,500	3,428.57
$1,000	300	40,000.00
$2,500	200	60,000.00
$250K/YR	3	4,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.96. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1349 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1349, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201006404

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 8, 2010

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Texas Board of Nursing

Differentiated Essential Competencies

On October 21, 2010, the Texas Board of Nursing approved revisions to the Differentiated Entry Level Competencies (DELCs) of Graduates of Texas Nursing Programs, Vocational (VN), Diploma/Associate Degree (DIP/ADN), Baccalaureate Degree (BSN), September 2002, and approval of new document, Differentiated Essential Competencies (DECs) of Graduates of Texas Nursing Programs Evidenced by Knowledge, Clinical Judgments, and Behaviors, October 2010.

These competencies, first approved in 1993 provide guidance to nursing educational programs for curriculum development; and revision for effective preparation of graduates who will provide safe, competent, compassionate care. As such, these competencies form the foundation of a nurse's scope of practice and serve as a guideline for employers to assimilate new graduates into the workplace.

There are twenty-five (25) core competencies, categorized under four (4) main nursing roles:

1. Member of the Profession

2. Provider of Patient-Centered Care

3. Patient Safety Advocate

4. Member of the Health Care Team

Each core competency is further developed into specific knowledge areas and clinical behaviors/judgments based upon the knowledge areas. The competencies are differentiated and progressive across the levels, and the scope of practice and expectations may be compared across the table.

The competencies may be located at http://www.bon.state.tx.us/about/pdfs/delc-2010.pdf.

TRD-201006497
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Filed: November 10, 2010

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On November 4, 2010, Kentucky Data Link, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60810. Applicant seeks approval to reflect a change in ownership/control whereby Kentucky Data Link, Inc.'s parent, Q-Comm will become the direct, wholly-owned subsidiary of Windstream Corporation.

The Application: Application of Kentucky Data Link, Inc. for an Amendment to Its Service Provider Certificate of Operating Authority, Docket Number 38867.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than November 29, 2010. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38867.

TRD-201006390
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 5, 2010

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On November 8, 2010, Covad Communications Company filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60192. Applicant seeks approval to reflect a corporate restructuring wherein applicant's unregulated subsidiary, Speakeasy Broadband Services, LLC will merge with and into applicant, with applicant as the surviving entity.

The Application: Application of Covad Communications Company for an Amendment to Its Service Provider Certificate of Operating Authority, Docket Number 38883.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than November 29, 2010. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas toll free at 1-800-735-2989. All comments should reference Docket Number 38883.

TRD-201006482
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 9, 2010

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Notice of Application for Approval of CREZ Default Project Reassignment

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 29, 2010 for approval of the reassignment of the rights and obligations for CREZ default projects.

Docket Style and Number: Application of Electric Transmission Texas, LLC for Approval of CREZ Default Project Reassignment, Docket Number 38861.

The Application: Electric Transmission Texas (ETT) filed an application with the commission for approval of the reassignment of the rights and obligations for CREZ default projects to ETT from AEP Texas North Company (TNC) and AEP Texas Central Company (TCC). ETT requests that the commission approve the reassignment of the following CREZ projects from TNC and TCC: (1) 300 MVAR Cap Bank on Oklaunion; (2) Rebuild Sonora to Hamilton 138-kV line; and (3) Upgrade Putnam to Leon 138-kV line.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's

Office of Customer Protection at (512) 936-7120 or 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 38861.

TRD-201006389
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 5, 2010

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Notice of Application for Waiver from Requirements in P.U.C. Substantive Rule §26.202

Notice is given to the public of an application filed on November 8, 2010 with the Public Utility Commission of Texas (commission) for waiver from the requirements in P.U.C. Substantive Rule §26.202.

Docket Style and Number: Application of Electra Telephone Company, Inc. for a Waiver of Requirements in P.U.C. Substantive Rule §26.202. Docket Number 38881.

The Application: Electra Telephone Company, Inc. (Electra) asserts that the requirements in P.U.C. Substantive Rule §26.202 are no longer applicable nor appropriate due to the Texas Legislature's repeal of §53.202 of the Public Utility Regulatory Act (PURA) upon which P.U.C. Substantive Rule §26.202 was based. The applicant stated its belief that the requirements of the rule are no longer mandated by PURA and that, until the commission repeals P.U.C. Substantive Rule §26.202, the commission should grant good cause waivers from such rule, pursuant to P.U.C. Procedural Rule §22.5.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas toll-free at 1-800-735-2989. All comments should reference Docket Number 38881.

TRD-201006486
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 9, 2010

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Notice of Application for Waiver from Requirements in P.U.C. Substantive Rule §26.202

Notice is given to the public of an application filed on November 8, 2010 with the Public Utility Commission of Texas (commission) for waiver from the requirements in P.U.C. Substantive Rule §26.202.

Docket Style and Number: Application of Tatum Telephone Company, Inc. for a Waiver of Requirements in P.U.C. Substantive Rule §26.202. Docket Number 38882.

The Application: Tatum Telephone Company, Inc. (Tatum) asserts that the requirements in P.U.C. Substantive Rule §26.202 are no longer applicable nor appropriate due to the Texas Legislature's repeal of §53.202 of the Public Utility Regulatory Act (PURA) upon which P.U.C. Substantive Rule §26.202 was based. The applicant stated its belief that the requirements of the rule are no longer mandated by PURA and that, until the commission repeals P.U.C. Substantive Rule §26.202, the commission should grant good cause waivers from such rule, pursuant to P.U.C. Procedural Rule §22.5.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas toll-free at 1-800-735-2989. All comments should reference Docket Number 38882.

TRD-201006487
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 9, 2010

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on November 8, 2010, to amend a certificate of convenience and necessity for a proposed transmission line in Delta County, Texas.

Docket Style and Number: Application of Lamar County Electric Cooperative Association for an Amendment to its Certificate of Convenience and Necessity for the 138-kV Lake Creek Transmission Line in Delta County. Docket Number 38832.

The Application: The application of Lamar County Electric Cooperative Association (LEC) for a proposed transmission line is designated the Lake Creek Transmission Line Project. The proposed project will be constructed on single circuit single steel pole structures and will be approximately 7.2 miles in length. The total estimated cost for the project is $7.5 million which will be paid completely by the consumer requesting the power, TransCanada Pipeline. The estimated date to energize facilities is July 2012.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is December 23, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas toll-free at 1-800-735-2989. All comments should reference Docket Number 38832.

TRD-201006485
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 9, 2010

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Notice of Petition for Determination of Eligibility for Universal Service Funding

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on November 5, 2010, for determination of non-eligibility for Texas Universal Service Fund (TUSF) disbursements pursuant to Public Utility Regulatory Act, §56.025 and P.U.C. Substantive Rule §26.406.

Docket Style and Number: Petition of Commission Staff for Determination of Non-Eligibility for Texas Universal Service Fund Disburse-

ments to Consolidated Communications of Texas Company pursuant to Public Utility Regulatory Act, §56.025 and P.U.C. Substantive Rule §26.406 and Refund of Disbursements. Docket Number 38872.

The Application: The petition seeks a commission determination that Consolidated Communications of Texas Company is no longer eligible to receive TUSF disbursements under PURA §56.025 and P.U.C. Substantive Rule §26.406, and to require Consolidated Communications of Texas Company to refund the TUSF disbursements that it received in violation of those provisions.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas toll-free at 1-800-735-2989. All comments should reference Docket Number 38872.

TRD-201006483
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 9, 2010

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Notice of Petition for Determination of Eligibility for Universal Service Funding

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on November 5, 2010, for determination of non-eligibility for Texas Universal Service Fund (TUSF) disbursements pursuant to Public Utility Regulatory Act, §56.025 and P.U.C. Substantive Rule §26.406.

Docket Style and Number: Petition of Commission Staff for Determination of Non-Eligibility for Texas Universal Service Fund Disbursements to Windstream Sugar Land, Inc. pursuant to Public Utility Regulatory Act, §56.025 and P.U.C. Substantive Rule §26.406 and Refund of Disbursements. Docket Number 38873.

The Application: The petition seeks a commission determination that Windstream Sugar Land, Inc. is no longer eligible to receive TUSF disbursements under PURA §56.025 and P.U.C. Substantive Rule §26.406, and to require Windstream to refund the TUSF disbursements that it received in violation of those provisions.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas toll-free at 1-800-735-2989. All comments should reference Docket Number 38873.

TRD-201006484
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 9, 2010

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South Texas Development Council

Notice of Request for Proposals - Fiscal Year 2011 Peace Officer Training Academy

The South Texas Development Council (STDC) is requesting proposals for the provision of basic and advanced/specialized peace officers' training. All basic and specialized training provided must be conducted in conformance with Texas Commission on Law Enforcement Officer Standards and Education requirements. Only one contract will be awarded. The STDC reserves the right to reject any and all proposals received and to award a contract only upon availability of funding from the Governor's Office, Criminal Justice Division.

Specifications, submittal requirements and other information may be obtained from Mr. Jose Conde, Regional Services Planner, STDC, 1002 Dicky Lane, P.O. Box 2187, Laredo, Texas 78044-2187, Tel: (956) 722-3995, Fax: (956) 722-2670.

TRD-201006257
Juan E. Rodriguez
Regional Services Director
South Texas Development Council
Filed: November 4, 2010

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Texas Department of Transportation

Aviation Division - Request for Proposal for Professional Engineering Services

The City of Grand Prairie, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional services firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional services as described below:

Airport Sponsor: City of Grand Prairie Grand Prairie Municipal Airport. TxDOT CSJ No. 11MPGNDPR.

Scope: Prepare Airport Master Plan for Grand Prairie Municipal Airport which includes, but is not limited to, information regarding existing and future conditions, proposed facility development to meet existing and future demand, constraints to develop, anticipated capital needs, financial considerations, management structure and options, as well as an updated Airport Layout Plan. The Airport Master Plan should be tailored to the individual needs of the airport.

There is no HUB goal. TxDOT Project Manager is Daniel Benson.

Interested firms shall utilize the Form AVN-551, titled "Aviation Planning Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-551, firms are encouraged to download Form AVN-551 from the TxDOT web site as addressed above. Utilization of Form AVN-551 from a previous download may not be the exact same format. Form AVN-551 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-551 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than **December 14, 2010, 4:00 p.m.** Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of TxDOT Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating consultants for airport planning projects can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Edie Stimach, Grant Manager, or Daniel Benson, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-201006385
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 5, 2010

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Aviation Division - Request for Proposal for Professional Engineering Services

The City of Gatesville, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Gatesville Municipal Airport during the course of the next five years through multiple grants.

Current Project: City of Gatesville. TxDOT CSJ No.: 11HGGATES.

Scope of Work: Engineering/design and construction services to construct a 10-unit T-hangar and construct hangar pavement around new T-hangars at the Gatesville Municipal Airport.

The DBE goal for the current project is 8%. The TxDOT Project Manager is Ed Mayle.

Future scope work items for engineering/design services within the next five years may include the following:

1. Rehabilitate and mark runway 17-35

2. Rehabilitate and mark apron, hangar access taxiway, and stub taxiway

The City of Gatesville reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Gatesville City Airport." The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Seven completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than **December 14, 2010, 4:00 p.m.** Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Beverly Longfellow, Grant Manager.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Beverly Longfellow, Grant Manager. For technical questions, please contact Ed Mayle, Project Manager.

TRD-201006479
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 9, 2010

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Notice of Public Hearing - Non-Radioactive Hazardous Materials Routes

In accordance with 43 TAC §25.103(g), the Texas Department of Transportation will hold a public hearing to receive comments on a proposal received from the Hidalgo County and Lower Rio Grande Valley Development Council to create designated Non-Radioactive Hazardous Materials routes in Hidalgo County.

The recommended routes begin on US 281 from SH 186 to US 83 and US 83 from the Starr County line to the Cameron County line. Including Nolana Street from US 281 to Jackson Street, the routes then run south on Jackson Street to US 281 Spur (south of US 83 Jackson Street is FM 2061). The route also contains a loop whose northern segment starts on FM 2221 (Jarra China) in La Joya thru FM 681, FM 2293 (Conway), FM 1925 and FM 1015 south to US 83. The southern loop segment starts on FM 1016 (Conway) in Mission thru SS 336, US 281 Spur, US 281 (Military Hwy) and FM 1015 north to US 83.

The hearing will be held at 1:30 p.m. on December 21, 2010 at the following location:

Texas Department of Transportation

Dewitt C. Greer State Highway Building

125 East 11th Street

Ric Williamson Hearing Room

Austin, Texas 78701

All interested citizens are invited to attend the hearing and to provide input. Those desiring to make official comments may register starting at 1:00 p.m. Oral and written comments may be presented at the public hearing or written comments may be submitted by regular postal mail during the 30-day public comment period. Written comments may be submitted to Carol T. Rawson, P.E., Director, Traffic Operations Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701. The deadline for receipt of written comments is 5:00 p.m. December 28, 2010.

Persons with disabilities who have special communication or accommodation needs or who plan to attend the hearing may contact the Government and Public Affairs Division, at 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-9957. Requests should be made no later than three days prior to the hearing. Every reasonable effort will be made to accommodate the needs.

TRD-201006386
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 5, 2010

Texas Workforce Commission

Resolution Establishing the Unemployment Obligation Assessment for Calendar Year 2011

Whereas, pursuant to Texas Labor Code, Chapter 203, Subchapter F, the Texas Public Finance Authority Unemployment Compensation Obligation Assessment Series 2010A and Series 2010B (the "Bonds") will be issued on behalf of the Texas Workforce Commission (the "Commission") and will be outstanding; and

Whereas, pursuant to Texas Labor Code, Section 203.105, the Commission is required to set the unemployment obligation assessment rate in an amount sufficient to ensure timely payment of Bond Obligations, consisting of the principal, premium if any, interest on the Bonds and bond administrative expenses, and to provide an amount which is necessary in the Commission's judgment to enhance investor acceptance of the Bonds; and

Whereas, the rate of the unemployment obligation assessment must be based on the formula prescribed in Commission rule 815.132 (40 Tex. Admin. Code, §815.132; and

Whereas, in the Financing and Pledge Agreement to be entered into by and between the Commission and the Texas Public Finance Authority (the "Authority"), in connection with the Bonds, the Commission has covenanted to impose an Unemployment Obligation Assessment so long as Bonds are outstanding in an amount not less than 1.50 times the amount of Bond Obligations due in the next calendar year; and

Whereas, the Authority has provided required notification of the amount of the Bond Obligations, including bond administrative expenses, estimated to be due in calendar year 2011;

Now, therefore, the Commission hereby RESOLVES:

1. In accordance with the formula provided in 40 Tex. Admin. Code §815.132 as set out in part in subsection (e):
"(e) The rate of the portion of the assessment that is to be used to pay a bond obligation is a percentage of the product of the unemployment obligation assessment ratio and the sum of the employer's prior year general tax rate, the replenishment tax rate and the deficit tax rate. The percentage to be determined by Commission resolution, shall not exceed 200%." The "percentage" for 2011 is 72%.

2. The 2011 percentage will generate the $370,000,000.00 the Authority has informed the Commission is needed to pay bond obligation and bond administrative expenses.

3. The 2011 percentage shall be published in the *Texas Register* on November 19, 2010.

Further, the Commission hereby CERTIFIES:

1. The 2011 percentage as set herein is set in accordance with the requirements of Chapter 203 of the Texas Labor Code.

2. The 2011 percentage is a rate that will provide at least 1.50 times the amount of Bond Obligations, including estimated bond administrative expenses, as determined by the Authority, due in calendar year 2011.

3. The action of the Commission reflected in this Resolution complies with the requirements Chapter 203 of Texas Labor Code.

Signed this 8th day of November 2010, upon the affirmative vote of a majority of the Commission present and voting.

Tom Pauken, Chairman
Commissioner Representing
Employers

Ronald G. Congleton,
Commissioner Representing
Labor

Andres Alcantar
Commissioner Representing
The Public

Attested:
(Secretary or other appropriate officer/employee of the Commission)

SWORN AND SUBSCRIBED TO before me this 8th day of November, 2010.

KIM MELTON
Notary Public, State of Texas
My Commission Expires
April 17, 2011

Notary Public

TRD-201006455
Paul N. Jones
General Counsel
Texas Workforce Commission
Filed: November 9, 2010

♦ ♦ ♦

University of North Texas

Public Notice - Renewal and Extension of Major Consulting Contract

Description of Activities Consultant Will Conduct:

The selected consulting firm will be responsible for assisting UNT in evaluating assessing and recommending of the pathway to accreditation of a joint PharmD program at UNT. The consultant must be able to provide a timeline and budget and be able to evaluate the following: (1) Faculty expertise needed and administrative needs; (2) Space requirements, including laboratory space; (3) Library resources needed; (4) Potential funding for research in pharmacy; (5) Assessment of pre-pharmacy programs and expectations for entering students; (6) Clinical placement of opportunities in Denton and Dallas for students; (7) Clinical appointments for faculty in hospitals or elsewhere; (8) Initial costs as well as ongoing costs; (9) Potential of partnerships with HSC; (10) Size of classes to achieve maximum benefit.

Name and Business Address of Consultant:

Dr. Rosalie Sagraves

857 Mount Vernon Court

Naperville, IL 60563

Total Value and Beginning and Ending Dates of Contract:

Value: $60,000.00

Beginning Date: October 26, 2009

Ending Date: October 31, 2011

Dates on Which Documents, Films, Recordings, or Reports that Consultant is required to present are due:

Date: Consultant is required to provide several written reports and plans on various dates.

TRD-201006495
Carrie Stoeckert
Assistant Director of PPS
University of North Texas
Filed: November 10, 2010

♦ ♦ ♦

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 35 (2010) is cited as follows: 35 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "35 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 35 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*